No. 82-1772

Office-Supreme Court, U.S.
FILED
APR 29 1983
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In the Supreme Court of the United States

OCTOBER TERM, 1982

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

FREEMAN H. RINGER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the district court had jurisdiction under 28 U.S.C. 1331 or 1361 to consider respondents' claims for reimbursement under the Medicare Program, notwithstanding the preclusion of judicial review provision in 42 U.S.C. 405(h).

2. Whether respondents' failure to exhaust their administrative remedies barred them from seeking review of the denial of their Medicare reimbursement claims under 42 U.S.C. 405(g).

PARTIES TO THE PROCEEDING

Other parties, in addition to those named in the caption, are Sanford Holmes, Norman R. Webster-Zieber, Jean Vescio, and Benjamin Winter, M.D. Respondents Holmes, Webster-Zieber, and Vescio sought to represent a class of Medicare beneficiaries who had undergone bilateral carotid body resection surgery and had claimed reimbursement prior to the time the suit was filed in district court. Respondent Ringer, who had not yet undergone the surgery when the suit was filed, sought to represent a class of Medicare beneficiaries who had not yet undergone the surgery and, hence, had not yet claimed reimbursement. App. B, *infra*, 11a.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-10a), as amended by order dated December 30, 1982, is reported at 684 F.2d 643. The opinion as reproduced in App. A, *infra*, incorporates corrections made pursuant to order dated February 1, 1983. The opinion of the district court (App. B, *infra*, 11a-17a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1982 (App. D, *infra*, 19a), and a petition for rehearing was denied on December 30, 1982 (App. C, *infra*, 18a). By order dated March 22, 1983, Justice

Rehnquist extended the time within which to file a petition for a writ of certiorari to and including April 29, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Social Security Act, Title 28 of the United States Code involved in this case are reproduced at App. E, *infra*, 20a-22a.

STATEMENT

This case concerns the jurisdiction of a federal district court to entertain a challenge to an administrative ruling barring reimbursement for a particular medical procedure under the Health Insurance for the Aged Act (42 U.S.C. (& Supp. IV) 1395 *et seq.*), commonly known as the Medicare Act.

1. The Medicare Program is divided into two parts. Part A of the Act (42 U.S.C. (& Supp. IV) 1395e to 1395i-2) provides insurance for hospital and related post-hospital services. 42 U.S.C. (& Supp. IV) 1395c and 1395d. Part B establishes a voluntary program of supplementary medical insurance covering, in general, 80% of the reasonable charges for physicians' services, medical supplies, and laboratory tests. 42 U.S.C. (& Supp. IV) 1395k, 1395*l* and 1395x(s). In addition to other limitations on coverage, the Act provides that no payment shall be made under Part A or Part B for any expenses incurred for items or services "which are not reasonable and necessary for the diagnosis or treatment of illness or injury * * *." 42 U.S.C. (Supp. IV) 1395y(a)(1).

The payment of benefits under Part B is administered by private insurance carriers pursuant to contracts entered into with the Secretary of Health and Human Services (HHS). 42 U.S.C. (& Supp. IV) 1395u. The claimant is entitled to an evidentiary hearing con-

ducted by the carrier if his claim is initially denied by the carrier and the amount in controversy is $100 or more. 42 U.S.C. (& Supp. IV) 1395u(b)(3)(C); see *Schweiker* v. *McClure*, 456 U.S. 188 (1982). Congress has foreclosed all judicial review of the carrier's denial of a claim after a hearing, *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982), whether the denial is based on the facts of the particular case or on an administrative instruction of general applicability issued by the Secretary.[1] This case principally concerns the availability of judicial review of benefit claims under Part A of the Medicare Program, which was not directly involved in *Schweiker* v. *McClure* or *United States* v. *Erika, Inc.*[2]

The Medicare Act and implementing regulations establish a detailed procedure for administrative review of claims for benefits under Part A. The Act directs the Secretary to determine the amount of benefits payable under Part A "in accordance with regulations prescribed by him" (42 U.S.C. 1395ff(a); see also 42 U.S.C. (& Supp. IV) 1395f, 1395g and 1395x(v)), but the Secretary is authorized to enter into a contract with a fiscal intermediary (such as a Blue Cross Association) under which the intermediary will determine the amount of benefits payable to the provider of services and make those payments directly to the provider on behalf of the Secretary. 42 U.S.C. (& Supp. IV) 1395h; 42 C.F.R. 405.702. If an individual is dissatisfied with the intermediary's determination, and the amount remaining in

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[1] In *Erika*, the carrier's denial of the full amount of reimbursement requested by the claimant was based in part on an administrative instruction issued to the carrier. See *Erika, Inc.* v. *United States*, 634 F.2d 580, 590-591 (Ct. Cl. 1980).

[2] Although respondents initially challenged actions of the Secretary in administering the Part B Program (E.R. 7, 33), that aspect of the case was not addressed by the court of appeals. ("E.R." refers to the Excerpt of Record filed in the court of appeals.)

controversy is $100 or more, the individual is entitled to an administrative hearing by the Secretary as provided in 42 U.S.C. (Supp. IV) 405(b). See 42 U.S.C. 1395ff(b)(1)(C) and (b)(2); 42 C.F.R. 405.720.[3] If the claim again is denied, he may seek review by the Appeals Council in HHS. 42 C.F.R. 405.724; 20 C.F.R. 404.967. The individual then is entitled to judicial review of "the Secretary's final decision after such hearing," as provided in 42 U.S.C. (Supp. IV) 405(g), if the amount remaining in controversy after the Appeals Council review is $1000 or more. 42 U.S.C. 1395ff(b)(1)(C) and (b)(2); 42 C.F.R. 405.730; 20 C.F.R. 404.981 and 422.210.

Section 405(g) in turn provides that an individual, "after a final decision of the Secretary made after a hearing to which he was a party," may obtain judicial review of that decision. Finally, Section 205(h) of the Act, as codified at 42 U.S.C. 405(h) and made applicable to Medicare cases by 42 U.S.C. 1395ii, provides that no findings of fact or decision of the Secretary may be reviewed by any tribunal "except as herein provided"—*i.e.*, except pursuant to 42 U.S.C. (Supp. IV) 405(g)—and that no action shall be brought against the United States or the Secretary under 28 U.S.C. 1331 or 1346[4] "to recover on any claim arising under the [Medicare Act]."

2. In January 1979, the Health Care Financing Administration (HCFA) in HHS issued an administrative instruction to Medicare Part A intermediaries and Part B carriers informing them that no reimbursement was to be made under the Medicare Program for expenses incurred in connection with a surgical procedure known as bilateral carotid body resection (BCBR) if the procedure was performed to relieve symptoms of pulmonary

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[3] There is an intervening layer of administrative reconsideration between the intermediary's initial denial and an administrative law judge ("ALJ") hearing. 42 C.F.R. 405.710-716.

[4] See note 12, *infra*.

distress (45 Fed. Reg. 71431-71432 (1980)). HCFA explained that BCBR had been "shown to lack general acceptance of the professional medical community" and that "controlled clinical studies establishing the safety and effectiveness of this procedure are needed" (*id.* at 71431). Accordingly, the instruction provided that BCBR operations to relieve pulmonary symptoms "must be considered investigational and cannot be considered reasonable and necessary within the meaning of [42 U.S.C. (Supp. IV) 1395y(a)(1)]" (45 Fed. Reg. 71431 (1980)). HCFA did state, however, that although reimbursement would not be made for the surgery generally, carotid body resection had been accepted by the medical community as effective to remove a mass in the carotid body itself, irrespective of symptoms, and that another specialized procedure in the carotid area also would be treated as reimbursable (*id.* at 71431-71432).

HCFA issued the instruction on the basis of advice from the Public Health Service and a special BCBR Task Force of the National Heart, Lung and Blood Institute of the National Institutes of Health (App. A, *infra*, 2a; 45 Fed. Reg. 71426 (1980)). The Public Health Service had "consistently advised HCFA" that the BCBR procedure, when performed to relieve the symptoms of pulmonary conditions such as asthma and emphysema, lacked general acceptance by the professional medical community "because of questions concerning efficacy and safety" (*id.* at 71426). Similarly, the 12-member Task Force was "unanimous in its view that before any procedure can be recommended as a therapeutic measure there should be a clear demonstration of efficacy and documentation that risk is acceptably small"; in the case of BCBR, the Task Force concluded, "neither criterion is met" (*id.* at 71429). The Task Force further observed that "[e]ven in the hands of experienced surgeons the procedure has a significant in-hospital mortality rate, and theoretical considera-

tions suggest that the risk of hypoventilation may be increased, especially in patients with chronic obstructive pulmonary disease" (*ibid.*).

After the instructions were issued, however, a number of Medicare beneficiaries nevertheless were able to receive reimbursement under Part A of the Act for hospital-related expenses associated with BCBR by obtaining a favorable ruling from an administrative law judge ("ALJ") after an administrative hearing or, in certain cases, from the Appeals Council (E.R. 57-80), because neither the ALJ nor the Appeals Council was bound by the intermediary instruction.[5] Accordingly, in October 1980, HCFA issued a formal administrative ruling, binding upon ALJs and the Appeals Council, that prohibited payments under Medicare for BCBR performed to relieve symptoms of pulmonary distress. 45 Fed. Reg. 71426-71427 (1980). HCFA explained that it interpreted the statutory prohibition against reimbursement for services that are not "reasonable and necessary" to "exclude from Medicare coverage medical and health care services and items that are not demonstrated to be safe and effective by acceptable clinical evidence" (*id.* at 71426). After reviewing the administrative proceedings in which the Appeals Council had permitted payment and consulting once more with the Public Health Service, HCFA again was unable to find that BCBR is safe and effective (*id.* at 71426, 71427).

b. In September 1980, respondents commenced this action in the United States District Court for the Central District of California, seeking declaratory and injunctive relief to prohibit the Secretary from refusing to recognize BCBR surgery as a "reasonable and necessary" treatment for obstructive pulmonary conditions

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[5] The Part B carriers' denials of claims for reimbursement for physicians and other services could not be appealed administratively to HHS (see page 3, *supra*), and the carriers' denials of coverage pursuant to the instruction therefore were final.

and to enjoin the Secretary from enforcing the instructions that prevented claimants from receiving reimbursement from intermediaries or from obtaining a fair hearing on their claims before an ALJ. Respondents consist of Dr. Benjamin Winter—a physician who developed a surgical technique for performing BCBR and is a chief proponent of the procedure (45 Fed. Reg. 71427 (1980))—and four Medicare beneficiaries. At the time the complaint was filed, three of the four beneficiary respondents had undergone BCBR surgery and had been denied reimbursement by fiscal intermediaries, but none had yet had a hearing before an ALJ. The fourth beneficiary, respondent Ringer, had not yet had the surgery.[6]

On February 18, 1981, the district court dismissed the complaint for lack of jurisdiction (App. B, *infra*, 11a-17a). The district court found that "[t]he essence of [respondents'] claim * * * is a claim of entitlement to benefits for the BCBR procedure" and held that such an action could not be brought under 42 U.S.C. 405(g) until the claimants had exhausted their administrative remedies (App. B, *infra*, 13a). The court noted that an appearance of futility alone does not render exhaustion unnecessary and that exhaustion could not be regarded as futile in this case in any event because, in the administrative hearings then being sought by respondents, the Secretary's position as to the reasonableness or efficacy of the procedure might change (*id.* at 13a-14a).[7]

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[6] Respondents sought to represent a class of beneficiaries seeking reimbursement for BCBR (E.R. 5-6, 31-32), but the district court dismissed the suit for lack of jurisdiction before ruling on the class certification issue (App. B, *infra*, 11a).

[7] The district court also held that respondents' constitutional argument—that forcing them to undergo administrative appeals in order to receive reimbursement violated their due process rights—was "inextricably intertwined with their challenge [to] the validity of the determination denying Medicare coverage"

c. The court of appeals reversed the dismissal of the complaint and remanded for consideration of respondents' claims on the merits. The court of appeals found that a "major thrust" of respondents' complaint was that the Secretary's instructions, barring reimbursement for the BCBR procedure on the ground that it had not been shown to be safe and effective, are an "unlawful interference in the administrative process for determining benefits" (App. A, *infra*, 3a). In the court's view, this is a "procedural" claim, not a substantive claim for benefits, and to this extent the instant suit therefore is not an action "to recover on [a] claim arising under" the Medicare Act for purposes of the jurisdictional bar in 42 U.S.C. 405(h). Accordingly, the court held that this "procedural" claim could be heard in a suit brought under 28 U.S.C. 1331 or 1361, and did not have to be brought under the special jurisdictional provision in 42 U.S.C. 405(g) (App. A, *infra*, 4a-6a).

The court of appeals recognized that in addition to challenging the Secretary's "procedures," respondents contended that the Secretary had "reached an improper substantive result in the process of determining whether benefits should be awarded" (App. A, *infra*, 6a). The court of appeals acknowledged that this contention did constitute a claim for benefits that had to be brought under 42 U.S.C. 405(g) and that a district court has jurisdiction under that Section only after the claimant has exhausted his administrative remedies. But the court of appeals nevertheless concluded that respondents' failure to pursue the administrative process to completion by obtaining an ALJ hearing and Appeals Council review before filing this action under 42 U.S.C. 405(g) did not require dismissal. The court advanced two reasons for this holding. First, the court held that the Secretary's issuance of a ruling requiring ALJs and the

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and that exhaustion was required for this claim as well (App. B, *infra*, 14a).

Appeals Council to deny claims for BCBR operations "indicated that [the Secretary] has no interest in appeals" and that "the Secretary believes appeals are worthless to the Agency as well as the claimant" (App. A, *infra*, 8a-9a). Second, the court reasoned that respondents' interest in having an initial benefit determination made "without the prejudice—and the necessary appeal—resulting from the HCFA ruling" barring the payment of claims by the intermediary or at the administrative level in HHS justified immediate judicial review (*id.* at 9a-10a).[8]

REASONS FOR GRANTING THE PETITION

The decision below cannot be reconciled with this Court's decisions in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), and *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), and it conflicts with decisions of other courts of appeals. Respondents' challenge to the Secretary's issuance of a ruling prohibiting Medicare reimbursement for BCBR operations in certain contexts plainly is "an action to recover on [a] claim" arising under the Social Security Act within the meaning of the jurisdictional bar in 42 U.S.C. 405(h), because respondents seek to overturn the Secretary's determination that their BCBR operations were not "reasonable and necessary" medical services for which reimbursement may be made. Accordingly, the district court lacked jurisdiction over the complaint under 28 U.S.C. 1331. Even if the

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[8] The court of appeals held that participants in the Medicare Program who had not yet even applied for benefits for BCBR, such as respondent Ringer, had not sufficiently exhausted their administrative remedies, but that this would not preclude the district court on remand from ordering the Secretary to withdraw the BCBR ruling on the basis of the claims of those who had filed applications (App. A, *infra*, 9a n.4). The court of appeals also indicated that the district court would be free to award benefits to claimants who had applied for them if the district court concluded that it was appropriate to do so (*ibid.*).

court of appeals were correct in characterizing respondents' claim as "procedural" to the extent that they challenge the Secretary's authority to determine by rule that a particular service has not been shown to be safe and effective, this Court's decisions in *Mathews* v. *Eldridge* and *Califano* v. *Yamasaki*, 442 U.S. 682 (1979), make clear that "procedural" challenges also must be brought under 42 U.S.C. 405(g), not 28 U.S.C. 1331. The exercise of mandamus jurisdiction under 28 U.S.C. 1361 was precluded in this case as well.

In addition, respondents' failure to exhaust their administrative remedies prior to bringing suit clearly foreclosed the district court from exercising jurisdiction under 42 U.S.C. 405(g). That Section by its terms authorizes judicial review only of a "final decision" of the Secretary rendered "after a hearing." See also 42 U.S.C. 1395ff(b). The court of appeals' holding that respondents nevertheless may be excused from obtaining a decision by an ALJ after a hearing and then seeking review by the Appeals Council is inconsistent with this Court's decisions in *Weinberger* v. *Salfi* and *Mathews* v. *Eldridge* and with decisions of other courts of appeals.

The court of appeals' ruling in this case encourages circumvention of the administrative procedures and jurisdictional limitations carefully crafted by Congress and the Secretary, and thereby poses a serious threat to the Secretary's ability efficiently to administer the Medicare Program and other Social Security programs in the manner Congress intended. Review by this Court therefore is warranted.

1.a. The court of appeals' holding that respondents' challenge to the intermediary and carrier instructions and subsequent formal ruling that prohibited Medicare reimbursement for BCBR could be brought under 28 U.S.C. 1331 is flatly inconsistent with this Court's decision in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975). In

Salfi, the plaintiffs brought an action under 28 U.S.C. 1331 challenging provisions restricting payment of benefits to surviving widows and children under the Social Security Act, 42 U.S.C. 416(c)(5) and (e)(2), on constitutional grounds. The Court concluded that the suit was one "seek[ing] to recover Social Security benefits" (422 U.S. at 756-757) and held that jurisdiction under 28 U.S.C. 1331 was barred by the third sentence of 42 U.S.C. 405(h), which provides that "[n]o action" shall be brought against the United States or the Secretary under 28 U.S.C. 1331 "to recover on 'any claim arising under [Title II]' of the Social Security Act." See 422 U.S. at 757-760. The Court rejected the contention that the plaintiffs' action was not one to recover on a claim "arising under" the Social Security Act because it also arose under the Constitution. The Court explained that not only were plaintiffs seeking to recover Social Security benefits, but also it was the Social Security Act that provided both the standing and the substantive basis for the presentation of their constitutional contentions. *Id.* at 760-761. Thus, the Court concluded, the jurisdictional bar in the third sentence of Section 405(h) "extends to any 'action' seeking 'to recover on any [Social Security] claim'—irrespective of whether resort to judicial processes is necessitated by discretionary decisions of the Secretary or by his nondiscretionary application of allegedly unconstitutional statutory restrictions." 422 U.S. at 762, quoting 42 U.S.C. 405(h).

By virtue of 42 U.S.C. 1395ii, Section 405(h) applies to the Medicare Act "to the same extent" as it applies to Title II of the Social Security Act, which was involved in *Salfi*. The decision in *Salfi* therefore controls here. If Section 405(h) bars jurisdiction under 28 U.S.C. 1331 even over a suit challenging a *statutory prohibition* barring the payment of benefits in a certain category of cases, as the Court held in *Salfi*, a fortiori Section 405(h) must bar federal question jurisdiction

over a suit challenging an *administrative ruling* issued by the Secretary that also prohibits the payment of benefits in a certain category of cases. To paraphrase the language of *Salfi* (422 U.S. at 762, quoted at page 11, *supra*), Section 405(h) bars jurisdiction under 28 U.S.C. 1331 irrespective of whether resort to judicial processes is necessitated by discretionary decisions of the Secretary, acting through the ALJs and Appeals Council, denying benefits in individual cases because he has found on the particular facts presented at a hearing that the medical procedure was not reasonable or necessary, or by an ALJ's or the Appeals Council's nondiscretionary application of an allegedly unlawful ruling issued by the Secretary that denies payment for this same reason.

The court of appeals attempted to avoid this result by characterizing respondents' claim as being in part a "procedural" one: a challenge to the Secretary's assertedly "unlawful interference" in the administrative processing of individual benefit claims (App. A, *infra*, 3a) by adopting a "presumptive rule" that the BCBR is not a reasonable and necessary medical service (*id.* at 5a). Even if respondents' challenge to the Secretary's instructions and ruling were correctly characterized as "procedural," however, that would not remove this case from the jurisdictional bar in 42 U.S.C. 405(h). The issues involved in *Mathews* v. *Eldridge* and *Califano* v. *Yamaski*—whether the claimants were entitled to a hearing prior to the termination of benefits or commencement of recoupment—clearly were "procedural" in nature, and yet jurisdiction in those cases was found under 42 U.S.C. 405(g), not 28 U.S.C. 1331. 424 U.S. at 327; 442 U.S. at 697-698. See also *Califano* v. *Sanders*, 430 U.S. 99, 109 (1977); cf. *Ellis* v. *Blum*, 643 F.2d 68, 77-78 (2d Cir. 1981).

In any event, and contrary to the court of appeals' characterization, respondents' objection is not "proce-

dural" in nature; they simply take issue with the Secretary's substantive determination that BCBR has not been recognized as safe and effective and thus does not qualify for reimbursement under the Medicare Act. Indeed, respondents' challenge to the Secretary's "presumptive rule" is essentially identical for present purposes to the issue involved in *Weinberger* v. *Salfi*. There, the plaintiffs challenged the duration-of-relationship prerequisite to the receipt of survivors benefits on the ground that it created an impermissible irrebuttable presumption[9] that a relationship of less than nine months' duration was a sham; the plaintiffs there, like respondents here, contended that claimants should have an opportunity to have the relevant issue decided on a case-by-case basis in the course of administrative proceedings. See 422 U.S. at 753, 767-768, 770-772, 782-785. The holding in *Weinberger* v. *Salfi* foreclosing jurisdiction under 28 U.S.C. 1331 therefore applies equally here, irrespective of the "procedural" label respondents and the court of appeals attach to their claim.

b. The decision below conflicts with decisions of other courts of appeals that have recognized that, when a claimant brings an action seeking increased reimbursement under the Social Security Act by urging the court to declare invalid a rule or regulation that serves to limit reimbursement in administrative proceedings, the action falls within the scope of the jurisdictional bar in 42 U.S.C. 405(h) and therefore cannot be brought under 28 U.S.C. 1331. See *Hadley Memorial Hospital, Inc.* v. *Schweiker*, 689 F.2d 905, 908-910 (10th Cir. 1982); *Hopewell Nursing Home, Inc.* v. *Schweiker*, 666 F.2d 34, 39 (4th Cir. 1981); *Humana of South*

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[9] See 422 U.S. at 753 and 770-772, citing *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974); *Vlandis* v. *Kline*, 412 U.S. 441 (1973); and *Stanley* v. *Illinois*, 405 U.S. 645 (1972).

Carolina, Inc. v. *Califano*, 590 F.2d 1070, 1079 (D.C. Cir. 1978); *Rhode Island Hospital* v. *Califano*, 585 F.2d 1153, 1158 (1st Cir. 1978). See also *National Ass'n of Home Health Agencies* v. *Schweiker*, 690 F.2d 932, 938 (D.C. Cir. 1982), cert. denied, No. 82-991 (Feb. 22, 1983); *Association of Am. Medical Colleges* v. *Califano*, 569 F.2d 101, 106-108 (D.C. Cir. 1977).

The courts of appeals also are divided on the question whether the jurisdictional bar in 42 U.S.C. 405(h) is applicable to claims, unlike that involved here, that accurately may be described as procedural in nature. The District of Columbia Circuit has held, for example, that challenges to the Secretary's failure to follow the notice and comment procedures of the Administrative Procedure Act[10] in issuing a rule under the Social Security Act may be brought under 28 U.S.C. 1331 notwithstanding the jurisdictional bar in 42 U.S.C. 405(h). See *National Ass'n of Home Health Agencies* v. *Schweiker*, *supra*, 690 F.2d at 936-937; *Humana of South Carolina, Inc.* v. *Califano*, *supra*, 590 F.2d at 1080-1081.[11] See also *St. Louis University* v. *Blue Cross Hospital Service*, 537 F.2d 283, 291-292 (8th Cir.), cert. denied, 429 U.S. 977 (1976); cf. *Ellis* v. *Blum*, *supra*, 643 F.2d at 82. The Tenth Circuit recently reached a contrary conclusion, holding that Section 405(h) bars federal question jurisdiction over Administrative Procedure Act ("APA") and related procedural

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[10] The Secretary has chosen to follow these procedures notwithstanding the exception from APA notice and comment requirements for benefits programs. 5 U.S.C. 553(a); see 36 Fed. Reg. 2532 (1971).

[11] Even the District of Columbia Circuit would regard respondents' challenge to the regulation here to be covered by the jurisdictional bar in 42 U.S.C. 405(h) because they seek to invalidate a regulation on the merits and thereby obtain increased reimbursement. *Humana of South Carolina, Inc.* v. *Califano*, *supra*, 590 F.2d at 1029.

challenges to the administration of the Medicare Program. See *Hadley Memorial Hospital, Inc.* v. *Schweiker, supra*, 689 F.2d at 910-912. Accord, *American Ass'n of Councils of Medical Staffs* v. *Califano*, 575 F.2d 1367, 1370-1373 (5th Cir. 1978); *Trinity Memorial Hospital of Cudahy, Inc.* v. *Associated Hospital Service, Inc.*, 570 F.2d 660, 667 (7th Cir. 1977). Review is warranted to resolve these conflicts among the circuits.[12]

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[12] In addition to finding federal question jurisdiction under 28 U.S.C. 1331, the court of appeals held that the district court had mandamus jurisdiction under 28 U.S.C. 1361 to entertain respondents' "procedural" claim (App. A, *infra*, 10a). This Court previously has reserved the question whether 42 U.S.C. 405(h) bars mandamus jurisdiction under 28 U.S.C. 1361 over an action arising under the Social Security Act. *Califano* v. *Yamasaki, supra*, 442 U.S. at 698; *Norton* v. *Mathews*, 427 U.S. 524, 529-530 (1976); *Mathews* v. *Eldridge, supra*, 424 U.S. at 332 n.12.

The third sentence of Section 205(h) of the Social Security Act, as originally enacted, provided that an action may not be brought under Section 41 of Title 28 of the United States Code to recover on a claim arising under Title II of the Social Security Act. As the Court explained in *Weinberger* v. *Salfi, supra*, 442 U.S. at 756 n.3, when Section 205(h) was enacted, Section 41 of Title 28 contained all of that Title's grants of jurisdiction to federal district courts, except for special purpose jurisdictional statutes of no relevance to Social Security cases. The mandamus statute, however, was not then in force and was not enacted until 1962 (Pub. L. No. 87-748, Section 1(a), 76 Stat. 744). (The express reference in Section 405(h) to 28 U.S.C. 1331 and 1346 was substituted by the codifiers, see 42 U.S.C. 405 note, 518, whose "choice, 'made * * * without the approval of Congress ... should be given no weight.'" *North Dakota* v. *United States*, No. 81-773 (Mar. 7, 1983), slip op. 10 n.13, quoting *United States* v. *Welden*, 377 U.S. 95, 99 n.4 (1964). It nevertheless would be consistent with the "sweeping" language of the third sentence of Section 205(h) (see *Weinberger* v. *Salfi, supra*, 422 U.S. at 757) to interpret it as barring jurisdiction under the later-enacted mandamus statute as well. And even if the third sentence does not foreclose mandamus jurisdiction, the

2. The court of appeals recognized that in addition to presenting what it found to be a "procedural" claim, respondents' action also embraces substantive claims for Medicare benefits to the extent that respondents seek a ruling that their BCBR operations were reasonable and necessary medical services. The court acknowledged that 42 U.S.C. 405(g) is the exclusive basis of jurisdiction for judicial review of respondents' substantive claims, but the court once again seriously misconstrued the statutory scheme by holding that respondents did not have to pursue their administrative remedies through the ALJ hearing stage and subsequent Appeals Council review before bringing suit under Section 405(g).

As explained above (see page 4, *supra*), the special judicial review section applicable to benefit determinations under Part A of the Medicare Program, 42 U.S.C. 1395ff(b), provides that the claimant is entitled to "judicial review of the Secretary's final decision after [a]

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second sentence of Section 205(h)—which provides that "[n]o findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided"—would bar review under the mandamus statute of a decision denying benefits.

Mandamus jurisdiction cannot in any event be permitted to circumvent the clear congressional purpose expressed in 42 U.S.C. 405(g) and (h)—to bar judicial review of decisions of the Secretary in administering the Social Security Act except as provided in that Act itself, and thereby to channel all judicial review through 42 U.S.C. 405(g)—at least where, as here, the particular claim involved in fact may be raised in an action under Section 405(g). Moreover, the instant case would be an especially inappropriate occasion for the exercise of mandamus jurisdiction, in view of the discretionary and judgmental nature of the Secretary's decision to bar reimbursement for the BCBR procedure, respondents' failure to exhaust their administrative remedies, and the availability of judicial relief under 42 U.S.C. 405(g). See, *e.g.*, *Hadley Memorial Hospital, Inc.* v. *Schweiker*, *supra*, 689 F.2d at 912; *Herzog* v. *Secretary of HEW*, 686 F.2d 1154, 1161 n.5 (6th Cir. 1982).

hearing as is provided in [42 U.S.C. 405(g)]." Section 405(g) likewise authorizes judicial review only of a "final decision of the Secretary made after a hearing * * *." In this case, however, respondents sought judicial review prior to their hearings before an ALJ and the Appeals Council, at a time when the Secretary had not yet rendered a "final decision" on their claims.

This Court has excused claimants from full exhaustion of administrative remedies under the Social Security Act prior to seeking judicial review under 42 U.S.C. 405(g) only in two narrowly defined situations: first, where the *Secretary* has concluded that further administrative proceedings are not necessary (*Weinberger* v. *Salfi*, *supra*, 422 U.S. at 766-767; *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 330); and second, where the claimant's interest in having a prompt resolution is so great that deference to the Secretary's judgment that further exhaustion should be required is inappropriate (*Mathews* v. *Eldridge*, *supra*, 424 U.S. at 330, 332). It is clear that neither exception is applicable here.

a. In *Weinberger* v. *Salfi*, the Court stressed that a "final decision" of the Secretary is a "statutorily specified jurisdictional prerequisite" and that Section 405(g) therefore is "something more than simply a codification of the judicially developed doctrine of exhaustion" (422 U.S. at 766). The Court held, however, that "the Secretary may specify such requirements for exhaustion as he deems serve his own interests in effective and efficient administration" and that, although "a court may not substitute its conclusion as to futility for the contrary conclusion of the Secretary," the statutory scheme does not bar the Secretary from determining in particular cases that full internal exhaustion is not necessary in order for a decision to be final for purposes of judicial review. 422 U.S. at 766-767.

Consistent with this view, the Court held in *Salfi* that the Secretary could dispense with the requirement of an ALJ hearing where he has resolved all issues regarding eligibility for benefits except one—the constitutionality of the statutory provision—in favor of the claimant and the remaining constitutional issue is beyond his competence to decide. 422 U.S. at 767. The Secretary did not challenge the sufficiency of the allegations of exhaustion in *Salfi*, and the Court interpreted this failure as a determination by the Secretary that the denial of benefits prior to a hearing was "final" for purposes of the litigation challenging the constitutionality of the statutory duration-of-relationship requirement. The Secretary has now codified the result in *Salfi* by incorporating in HHS regulations a formal procedure for dispensing with the need for an ALJ hearing or Appeals Council review prior to seeking judicial review, if the claimant and HHS agree that all other eligibility criteria have been satisfied and the only remaining issue is the constitutionality of a statutory provision. 42 C.F.R. 405.718(d).

The instant case is wholly different from *Salfi*. Here, the Secretary moved to dismiss the action under 42 U.S.C. 405(g) on the ground that respondents had not exhausted their administrative remedies, thereby refuting any suggestion that he had determined that the denial of coverage for BCBR prior to an ALJ hearing or Appeals Council review was a sufficiently "final decision" for purposes of judicial review. The court of appeals nevertheless excused exhaustion of remedies because it believed that the 1980 HCFA ruling, while "nominally leaving the administrative review process open, * * * not only makes appeals futile, it also indicates that the Secretary believes appeals are worthless to the Agency as well as the Claimant" (App. A, *infra*, 8a-9a). This reasoning is seriously flawed.

The court of appeals pointed to nothing to suggest that the Secretary, by issuing the ruling, had waived the requirement of full exhaustion of administrative remedies. The Secretary's regulations, for example, contain no provisions comparable to those applicable to constitutional issues that establish a procedure for the bypassing of ALJ and Appeals Council review whenever the question of the validity of a ruling is at issue. In the absence of such an exception, the regulations establish that a final decision for purposes of judicial review results only after Appeals Council review. See *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 765; 20 C.F.R. 404.900(a)(5); 42 C.F.R. Part 405, subpart G app.[13] And insofar as the court's conclusion rested on its own view that further exhaustion would be futile, that holding is inconsistent with the teaching of the Court's decision in *Weinberger* v. *Salfi* that a court may not substitute its judgment for that of the Secretary on the question of futility.

b. The court of appeals' holding with regard to the futility of exhaustion is truly bizarre in the circumstances of this case, because respondents in fact obtained meaningful administrative review at an ALJ hearing while this case was pending before the court of appeals. This development was called to the court's at-

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[13] In 1980, Congress amended 42 U.S.C. (& Supp. V) 1395*oo*(f), which provides for judicial review of reimbursement decisions under Part A by the Provider Reimbursement Review Board (PRRB) in HHS in a manner similar to that provided for individual claims under 42 U.S.C. 405(g), to authorize immediate judicial review of a question of law or regulations whenever the *PRRB* determines that it is without authority to decide the question. This indicates that the solution preferred by Congress when a case presents a legal question that cannot be resolved at the administrative level likewise is not to permit a *court* to excuse exhaustion, as the court of appeals did here, but to provide a mechanism for the Secretary to expedite that exhaustion. See *National Ass'n of Home Health Agencies* v. *Schweiker*, *supra*, 690 F.2d at 939; H.R. Rep. No. 96-1167, 96th Cong., 2d Sess. 394 (1980).

tention in the government's petition for rehearing, yet the court did not alter its holding.

After this suit was filed, an ALJ in fact held an extensive hearing on claims filed by 132 claimants who had had BCBR surgery performed by Dr. Winter and were represented by him in administrative proceedings. See *In the Case of Benjamin Winter, M.D., Representative for 132 Claimants* (Feb. 27, 1982), Exh. A. to Appellee's Petition for Rehearing. The beneficiaries whose claims were before the ALJ included the three respondents in this case (Holmes, Webster-Zieber, and Vescio) who had already had the surgery when this case was filed (*id.* at 5, 9).[14] These three respondents and 60 other claimants had the surgery before HCFA issued the ruling in 1980 binding the ALJs and the Appeals Council (*id.* at 1). The ALJ concluded that the 1980 ruling did not govern such pre-1980 ruling claims[15] and proceeded to reach the merits of the 63 claims that were properly before him. After examining the extensive medical testimony and other evidence (*id.* at 16-33), the ALJ concluded that BCBR was not a "reasonable and necessary" medical procedure and, on this basis, denied reimbursement for some 45 claimants, including respondent Vescio (*id.* at 8-9, 35-44). However, the ALJ refused to consider some 36 claims on the merits, including those of respondents Holmes and Webster-Zieber, because Dr. Winter, as their representative, had not requested an ALJ hearing for them within 60 days of the denial of their individual claims at the reconsideration stage, as required by HHS regula-

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[14] The fourth respondent who is a Medicare beneficiary, Ringer, had not yet had the BCBR surgery and therefore had not even satisfied the jurisdictional requirement of having filed an application for benefits for such surgery. See *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 330.

[15] The ALJ held that the 1980 ruling *was* binding with respect to the claims of beneficiaries who had the BCBR surgery after the ruling was issued, and he denied payment to 59 claimants who had post-ruling surgery on that basis alone (*In the case of Benjamin Winter, M.D., supra*, slip op. 1-4, 34-35, 43).

tions (*id.* at 4-7; see 42 C.F.R. 405.722). But for this procedural default, the claims of these other pre-ruling claimants also would have been addressed on the merits by the ALJ.[16] Accordingly, although the ALJ ultimately denied recovery, it is manifest from the ALJ's extensive consideration on the merits of the very type of claims respondents seek to raise in this action that the pursuit of the administrative process was not regarded by the Secretary as futile.[17] The court of appeals' holding that the district court should have allowed the case to proceed without further exhaustion of administrative remedies thus is totally inexplicable.

The individuals whose claims were denied by the ALJ may seek review by the Appeals Council. Given the Appeals Council's prior decision awarding benefits for the BCBR procedure, there is no reason to suppose that the Secretary regards such an appeal as futile for the claimants not covered by the 1980 ruling. However, after the court of appeals rendered its decision in this case, counsel for the claimants in the administrative proceedings requested that the Appeals Council stay its consideration of the appeals because of the "intervening event" of the court of appeals' decision. Counsel stated that the court of appeals had "remanded the case to the District Court for trial of many of the legal issues now before the Appeals Council." Thus, counsel contended, the district court's decision after remand in the instant case regarding "the validity of HCFA's BCBR policy" "will also resolve—or at least offer substantial guidance in resolving—many of the BCBR cases pending before

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[16] Thus, respondents Holmes and Webster-Zieber not only failed to exhaust their administrative remedies, but committed a procedural default that *foreclosed* recovery at the administrative level. Nevertheless, they apparently contend that they are entitled to relief in the instant suit.

[17] Given the ALJ's holding that the 1980 HCFA ruling did not apply to the respondents who had had the BCBR procedure, they do not even have standing in this case to challenge its validity.

the Appeals Council."[18] Respondents thus have stood the doctrine of exhaustion on its head, urging that the responsible *administrative* body should stay its hand pending respondents' exhaustion of *judicial* remedies. This blatant disregard of exhaustion requirements by respondents and the court of appeals should not go uncorrected.

c. The court of appeals also believed that the exception to the exhaustion requirement recognized in *Mathews* v. *Eldridge*, was applicable here (App. A, *infra*, 9a-10a). This holding, too, was quite mistaken. In *Mathews* v. *Eldridge*, the Court stated that even when the Secretary has determined that a particular decision is not yet final for purposes of seeking judicial review, "cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate" (424 U.S. at 330). The claim of the plaintiff in *Mathews* v. *Eldridge* that he had a constitutional right to a hearing prior to the termination of his disability benefits was found to be such an issue. The Court relied on two factors: first, the constitutional issue was "entirely collateral to the substantive claim of entitle-

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[18] See Exh. B to Appellee's Petition for Rehearing. We have been furnished by HHS with the following information concerning counsel's request: The Appeals Council granted counsel's request that the administrative appeals be held in abeyance, apparently pursuant to a general policy of the Appeals Council to grant a stay when the claimant so requests and has given a reasonable basis for doing so. However, in response to a February 17, 1983 letter from the Administrator of HCFA requesting that the Appeals Council proceed with the appeals, the Appeals Council, by letter dated March 25, 1983, requested counsel to inform it within 20 days of any reasons why it should not decide the appeals. By letter dated April 12, 1983, counsel again requested that the appeals be stayed, citing, *inter alia*, a desire to avoid duplicative proceedings before the Appeals Council and the district court. As of the date of the filing of this petition for a writ of certiorari, the Appeals Council had not taken any further action on the matter of the stay.

ment"; and second, the claim of a constitutional right to a predeprivation hearing rested on the proposition that full relief could not be obtained following a postdeprivation hearing, and in view of his physical condition and dependency on disability benefits, the plaintiff had made a "colorable claim" that an erroneous pre-hearing termination of benefits would injure him in a way that would not be recompensable through retroactive payments if he later were found eligible after a hearing.

Neither of the factors supporting the exception in *Mathews* v. *Eldridge* is present here. Respondents' challenge to the instructions and subsequent ruling barring reimbursement for BCBR is not at all "collateral" to their substantive claim of entitlement; it is intimately bound up with respondents' substantive contention that the BCBR surgery is reasonable and necessary within the meaning of the Medicare Act. Moreover, respondents have advanced no colorable claim that an erroneous denial of benefits for the BCBR procedure at an early stage in the administrative proceedings will injure them in a way that cannot adequately be remedied if they are subsequently awarded benefits upon a finding by an ALJ, the Appeals Council, or even a court on judicial review under 42 U.S.C. 405(g) that BCBR is a reasonable and necessary procedure. Respondents are not receiving benefits that HHS has sought to terminate and on which they might have become dependent. They are simply seeking a one-time reimbursement for a particular medical procedure.

d. The decision below conflicts with rulings of other courts of appeals that have adhered to *Weinberger* v. *Salfi* and *Mathews* v. *Eldridge* and recognized that administrative procedures must be exhausted before seeking judicial review, even where it appears that the particular issue on which judicial review is sought might not be resolved in the claimant's favor at the administrative level. See, *e.g.*, *Hopewell Nursing Home, Inc.* v. *Schweiker*, *supra*, 666 F.2d at 40, 42; *Humana of South Carolina, Inc.* v. *Califano*, *supra*,

590 F.2d at 1075-1076; *Rhode Island Hospital Ass'n* v. *Califano*, *supra*, 585 F.2d at 1159; cf. *Hadley Memorial Hospital, Inc.* v. *Schweiker*, *supra*, 689 F.2d at 912. This conflict, too, warrants resolution.

3. The decision of the court of appeals in this case threatens substantially to disrupt the orderly and efficient administrative determination of claims for benefits under the Medicare Program and the Social Security Act generally. Adherence to the requirement that claims be brought under the special administrative and judicial review provisions of 42 U.S.C. (& Supp. IV) 1395ff, 405(b) and (g), notwithstanding the apparent applicability of a regulation precluding recovery, "assures the Secretary the opportunity prior to [litigation challenging the validity of the regulation] to ascertain, for example, that the particular claims involved are neither invalid for other reasons nor allowable under other provisions" (*Weinberger* v. *Salfi*, *supra*, 422 U.S. at 762).

The Secretary might determine, for example, that the claimants were barred from recovery in any event because of a procedural default, lack of eligibility, or other reason. Conversely, he might conclude in the course of the administrative review process that reimbursement is appropriate notwithstanding the regulation. As noted above, payment is authorized for the BCBR procedure when performed to remove masses from the carotid bodies, rather than simply to relieve symptoms of pulmonary disease. In addition, the ruling or regulation in question might be found inapplicable to the particular claimant, as was true with respect to the respondents in the instant case who had BCBR surgery before the date of the 1980 HCFA ruling that bound ALJs. And even if the ALJ or Appeals Council ultimately were to deny payment, the evidentiary record developed in the administrative proceedings would furnish a basis for the Secretary to reconsider his prior ruling or for the court, on judicial review under 42 U.S.C. 405(g), to consider fully the merits of the indi-

vidual's claim for benefits and the challenge to the Secretary's denial of benefits.

It is possible that, after the issues relevant to the appropriateness of a particular rule have been fully ventilated within HHS, the Secretary would determine that it would not be necessary for a claimant to have an ALJ hearing and pursue an appeal to the Appeals Council in order to challenge that rule in court. At that point, the Secretary would be free under *Weinberger* v. *Salfi* to waive the requirement of full exhaustion. But until the Secretary has made that judgment with respect to the particular claims in issue, the courts must adhere to the normal requirements of exhaustion.

Under the reasoning of the court of appeals, however, it would appear that virtually any beneficiary whose claim for benefits might be affected or governed by a regulation of general applicability could ignore the special administrative and judicial review process established under 42 U.S.C. (Supp. IV) 405(b) and (g) and bring an independent action under 28 U.S.C. 1331 to challenge the regulation, on the theory that such a suit would be a "procedural" challenge to the Secretary's "interference" with what, according to the beneficiary, should be a case-by-case determination of the claim by intermediaries, HHS employees, ALJs, or the Appeals Council. Even if the court perceived that such a claim in fact constituted a substantive claim for benefits, for which federal question jurisdiction is barred by 42 U.S.C. 405(h), the court could exercise jurisdiction under 42 U.S.C. 405(g): the court of appeals' holding dispensing with the requirement of exhaustion of remedies through the ALJ and Appeals Council stages apparently would apply in any case in which the Secretary had issued a ruling or regulation purporting to bind the ALJs or the Appeals Council. The result would be to subject every ruling and regulation of general applicability to premature judicial attack, divorced from the particular factual setting of the individual's claim.

The question of the scope of 42 U.S.C. 405(g) and (h) with respect to the preclusion of jurisdiction under 28

U.S.C. 1331 and 1361 and the requirement of exhaustion of administrative remedies prior to the bringing of an action under 42 U.S.C. 405(g) thus is one of substantial importance in the administration of the Medicare Act. As we have noted above, these questions already have spawned a number of conflicting decisions by the courts of appeals. Moreover, we have been informed by HHS that there are now pending in the lower courts at least two dozen additional cases under the Medicare Act alone that raise similar questions concerning the scope of Section 405(h) and that in at least ten of these cases the plaintiffs are relying on the court of appeals' decision in this case in seeking immediate judicial review. And the rationale of the decision below, including the strained construction given the preclusion of review and exhaustion requirements of 42 U.S.C. 405(g) and (h), cannot be limited to Medicare cases, but would be equally applicable to the old age, survivors, and disability insurance program under Titles II and XVI of the Social Security Act, under which millions of claims are filed and hundreds of thousands of ALJ hearings are conducted annually.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1983

APPENDIX A

AMENDED OPINION†

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

No. 81-5413

FREEMAN H. RINGER, SANFORD HOLMES, NORMAN R. WEBSTER-ZIEBER, AND JEAN VESCIO, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED, AND BENJAMIN WINTER, M.D., PLAINTIFFS-APPELLANTS,

v.

RICHARD S. SCHWEIKER,* IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLEE.

Argued and Submitted Jan. 8, 1982.
Decided Aug. 19, 1982.
As Amended Dec. 30, 1982.

OPINION

NELSON, Circuit Judge:

The above named plaintiffs, except Benjamin Winter, M.D., (Ringer Group) and the proposed class are allegedly qualified participants in the Medicare program and appeal the order dismissing their action for want of sub-

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† Amended Opinion of Dec. 30, 1982 was corrected by order of the court [dated February 1, 1983].

* We substitute the name of Richard S. Schweiker as successor to Patricia Roberts Harris as Secretary, the original defendant, per Fed.R.App.P. 43.

ject matter jurisdiction entered by the district court on February 17, 1981.

Timely notice of appeal was filed. We note jurisdiction under 28 U.S.C. § 1291 (1976) and vacate the order and remand the cause.

FACTUAL AND PROCEDURAL BACKGROUND

This appeal involves the administration by the Secretary of Health and Human Services (Secretary) of the Medicare Act (the Act). 42 U.S.C.A. §§ 1395–1395vv (West 1974 & Supp. 1982). Section 1862(a)(1) of the Medicare Act, 42 U.S.C.A. § 1395y(a)(1) (West Supp.1982), precludes reimbursement for any "items or services . . . which are not reasonable and necessary for the diagnosis or treatment of illness or injury. . . ." In January, 1979, the Secretary, through the Health Care Financing Administration (the HCFA), issued an instruction to intermediaries and carriers who service Medicare claims that the operation known as a bilateral carotid body resection (BCBR) was not a "reasonable and necessary" operation. This decision was based on reports of the Public Health Service and a task force of the National Heart, Lung and Blood Institute.

The January, 1979, instruction to intermediaries and carriers prevented the intermediaries and carriers from paying benefits for any BCBR operation. The ruling did not, however, preclude benefits claimants from seeking review of the denial of benefits before an administrative law judge (ALJ). The claimants accordingly brought appeals to ALJs and, until October, 1980, ALJs consistently held that the BCBR operation was reasonable and necessary and allowed payment of benefits. Decisions of ALJs can be reviewed by the Appeals Council of the Social Security Administration, and the Appeals Council, too, has found the BCBR operation reasonable and necessary. *In re Ferguson*, No. 126-12-3830 (HHS Appeals Council, October 18, 1979). The Secretary, apparently seeking to insure that no benefits were paid for

the BCBR operation, issued a ruling in October, 1980, which prohibited payments for the operation. This ruling conclusively held that the BCBR operation "is not established as safe and effective and, therefore, is excluded from medicare coverage under the authority of section 1862(a)(1) of the Act." 45 Fed.Reg. 71,426 (1980). The ruling purported to prohibit ALJs and the Appeals Council from determining that benefits could be paid for BCBR operations, and ALJs have, since the ruling, denied all requests for benefits without a hearing.

The Ringer Group filed this action in the district court in September, 1980. The Group complained that the Secretary's policy prohibiting intermediaries and carriers from awarding benefits for the BCBR operation was an unlawful interference in the administrative process for determining benefits. The October, 1980, ruling—according to the Group—exacerbated this unlawful interference by completely foreclosing any award of benefits within the administrative process. The complaint sought relief in several forms including invalidation of the Secretary's policy and ruling that the BCBR operation is not reasonable and effective, and an injunction requiring the Secretary to declare the BCBR operation reasonable and necessary. The Group claimed that the district court had jurisdiction under 28 U.S.C. § 1361 (1976) (mandamus); 28 U.S.C.A. § 1331 (West Supp.1982) (federal question); and 42 U.S.C.A. § 405(g) (West Supp. 1982) (judicial review under the Medicare Act).

The district court dismissed for lack of jurisdiction. The jurisdictional provisions of the Medicare Act require that any action "to recover on a claim arising under" the Act can only be brought after exhaustion of administrative appeals pursuant to 42 U.S.C.A. § 405(g) (West Supp.1982); jurisdiction for such claims cannot be based on 28 U.S.C.A. § 1331 (West Supp.1982) (federal

question) or 28 U.S.C. § 1361 (1976) (mandamus). *See* 42 U.S.C.A. § 405(h) (West Supp.1982). The district court characterized the Ringer Group's action as essentially an action to recover on a claim and concluded that jurisdiction could not be based on the federal question or mandamus statutes. The district court also concluded that the Group had failed to exhaust its administrative remedies, and therefore concluded that jurisdiction over substantive claims could not be based on subsection 405(g). The Ringer Group brought this timely appeal.

DISCUSSION

Two questions are presented on appeal. The first is whether the district court erred in concluding that the Ringer Group's action was essentially one to recover on a claim arising under the Act. The second question is whether the district court erred in concluding that the Group's members had failed to exhaust administrative remedies for their substantive claims.

I. *Is the Ringer Group's Action an Action to Recover on a Claim Arising Under the Act?*

This court has held that the statute limiting the jurisdictional basis of claims arising under the Medicare Act has a relatively narrow scope. In *Daniel H. Freeman Memorial Hospital v. Schweiker*, 656 F.2d 473 (9th Cir.1981), we held that the language prohibiting reliance on the federal question or mandamus provisions for any action "to recover on a claim arising under" the Act only applied to actual claims for benefits. We noted that "when suit is brought simply to vindicate an interest in procedural regularity, there is no statutory bar." *Id.* at 476.[1] *See also Humana of South Carolina, Inc.*

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[1] In *Freeman*, the court concluded that the challenged action should not have been reviewed by the district court because the procedural propriety of the action depended on evaluation of facts that would be determined in a pending administrative pro-

v. Schweiker, 590 F.2d 1070, 1080 (D.C.Cir.1978); *Elliott v. Weinberger*, 564 F.2d 1219, 1226 (9th Cir. 1977), *aff'd in part and rev'd in part on other grounds sub nom. Califano v. Yamasaki*, 422 U.S. 682, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979) ("[t]he distinction between due process questions relat[ing] to the merits of a benefits claim is a significant one, requiring considerably different treatment by the courts").

The district court rejected the Ringer Group's argument that its action was one for procedural relief rather than one for benefits. The district court noted that the Ringer Group's action included challenges to the procedure followed by the Secretary, but concluded that the Group's procedural challenges were "inextricably intertwined with [its] challenge of the validity of the determination denying them medicare coverage."

We cannot agree with the district court's conclusion that the procedural claims may not be considered apart from the substantive claims. The major thrust of the Group's complaint is that the Secretary's presumptive rule that the BCBR operation is not reasonable and necessary was an unlawful administrative mechanism for determining awards of benefits. The Ringer Group sought, first and foremost, to invalidate the Secretary's procedure. In several parts of its prayer for relief the Ringer Group does appear to ask for substantive relief

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ceeding. The Secretary argues that the Ringer Group's challenge should not be decided because, even if the district court had jurisdiction, the "procedural claim was intimately related to their [sic] substantive claims." We note below that we do not accept the premise of the Secretary's argument, i.e., that the procedural claims are intimately related to the substantive claims. We see no facts that might be developed at an administrative hearing that would aid the court in resolving the procedural questions. Furthermore, an extensive record has been compiled in the administrative proceedings held thus far, to which the court could look in order to determine any facts that it might find useful.

by suggesting that the court should require the Secretary to declare the BCBR operation reasonable and necessary. We recognize that such claims are essentially claims for benefits. But we do not see these claims as the central element of the complaint, and we believe the procedural claims may be considered apart from these claims.

The Group has primarily sought to prevent a binding ruling that the BCBR operation is not reasonable and necessary, and has only secondarily sought to have the court declare that the operation should in fact be considered reasonable and necessary. We therefore conclude that the procedural claims raised by the Ringer Group are properly brought under the federal question and mandamus statutes.

II. ***Did the Ringer Group Fail to Exhaust Administrative Remedies for its Substantive Claims for Benefits?***

In addition to its procedural claims, the Ringer Group—in claiming that the BCBR operation is reasonable and necessary, and in seeking an injunction to require the Secretary to declare the operation reasonable and necessary—has raised substantive claims for benefits. These claims do not suggest that the Secretary followed improper procedures, but that he reached an improper substantive result in the process of determining whether benefits should be awarded. The Group has not sought relief in the form of an actual award of benefits, but that is only because other (relatively minor) substantive determinations must be made. A claim for recovery of benefits cannot be transformed into some other type of claim simply by challenging one of the substantive determinations rather than the final result.

The courts have jurisdiction to review substantive claims for benefits only after administrative remedies have been exhausted. *See* 42 U.S.C.A. §§ 405(g) &

405(h) (West Supp.1982).[2] The district court concluded that it had no jurisdiction to hear substantive claims because the members of the Ringer Group failed to exhaust their administrative remedies.

We cannot agree with the district court that the members of the Group had failed to exhaust administrative remedies to the extent required by subsection 405(g). Although the members of the Group did not take administrative appeals, we find that such appeals were not required in this case.

The Supreme Court has indicated two circumstances under which administrative appeals may be dispensed with as a prerequisite to jurisdiction under subsection 405(g). In *Weinberger v. Salfi*, 422 U.S. L.Ed.2d 522, 538-40 (1975), the Court allowed a claim under subsection 405(g) because the Secretary had not complained of the failure to exhaust administrative remedies. The Court noted the purposes of the exhaustion requirement:

> Exhaustion is generally required as a matter [sic] of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.

422 U.S. at 765, 95 S.Ct at 2467, 45 L.Ed.2d at 538-39. The Court then held that appeals are unnecessary when the agency has concluded that, for its purposes, the decision is final. The Court summarized by noting that "[o]nce a benefit applicant has presented his or her claim at a sufficiently high level of review to satisfy the

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[2] The claims cannot be heard under the federal question or mandamus statutes simply because they are appended to procedural claims which can be brought under those statutes.

Secretary's administrative needs, further exhaustion would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by any administrative or judicial interest." 422 U.S. at 765-66, 95 S.Ct. at 2467, 45 L.Ed.2d at 538-39.

We find this exception to the requirement of administrative appeals applicable to this case. By issuing a ruling that purports to bind ALJs and the Appeals Council to the denial of benefits for BCBR operations, the Secretary has indicated that it has no interest in appeals at or beyond the ALJ level. Thus, the ruling makes clear that the Secretary will treat as final any denial of benefits for the BCBR operation. Although nominally leaving the administrative review process open for claims involving this operation, the Secretary's ruling makes the results of that process both pre-ordained and immutable.[3] The ruling not only makes appeals futile, it also

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[3] The present case is thus distinguishable from *Pacific Coast Medical Enterprises v. Harris*, 633 F.2d 123 (9th Cir. 1980), which also involved the scope of permissible judicial review under the standards of the Medicare Act. In the present case, the Secretary's decision meant that ALJ decisions were both predetermined and final for a particular category of claims. In *Pacific Coast*, however, the Secretary's decision did not abbreviate the administrative process. It merely affected a factual issue that was common to several claims, but that might be readdressed by the Secretary in each claim.

In *Pacific Coast*, the court held that the Secretary had erred in ruling that a particular provider's claims could not be calculated by using a stepped up basis. Although the stepped up basis dispute involved the validity of claims from several years, the court in *Pacific Coast* would only apply its ruling to the single claim which had satisfied the process of administrative review required by the Medicare Act. Claims from other years, the court observed, had not been denied full review by the Secretary and might provide the Secretary an opportunity "to review his original decision." 633 F.2d at 138. Thus, the court concluded that claims from other years, although arguably excused

indicates that the Secretary believes appeals are worthless to the Agency as well as the claimant. Thus, as in *Salfi*, there is no reason to deny immediate access to judicial review under subsection 405(g).[4]

The Supreme Court has also found administrative appeal unnecessary when an appeal would fail to vindicate all the interests pressed by claimants, even if the claimant won the appeal. Thus, in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the Court allowed a claimant immediate judicial review under subsection 405(g) because the claimant asserted that he was erroneously denied a hearing before deprivation of benefits. 424 U.S. at 331-32, 96 S.Ct. at 900-01, 47 L.Ed.2d at 31. The Court concluded that the claimant had "raised at least a colorable claim that . . . an erroneous termination [of benefits] would damage him in a way not recompensable through retroactive payments." 424 U.S. at 331, 96 S.Ct. at 901, 47 L.Ed.2d at 31.

The Ringer Group has similarly presented a colorable claim that its members will not be compensated by an award of benefits on appeal. Specifically, the Group asserts that it has a right to have a determination of the

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from traditional, judicially constructed exhaustion requirements, could not satisfy the more rigorous limits that 42 U.S.C. § 405(h) places on judicial review of Medicare provider claims.

[4] Members of the Ringer Group who have not yet applied for benefits do not appear to have presented their claim at a sufficiently high level. *Cf. Weinberger v. Salfi*, 422 U.S. 749, 764, 95 S.Ct. 2457, 2466, 45 L.Ed.2d 522, 538 (1975) (plaintiffs who had not filed claim for benefits had not met jurisdictional requirements of subsection 405(g)). This does not, however, preclude the court from ordering the Secretary to withdraw its ruling on the basis of the claims of those who have applied for benefits, or of awarding benefits to those who have applied, if the court feels it is appropriate to award benefits. *Cf. Califano v. Yamasaki*, 442 U.S. 682, 704, 99 S.Ct. 2545, 2559 61 L.Ed.2d 176, 194 (1979) (approving order granting relief to persons "when they claim" benefits).

reasonableness and necessity of the BCBR operation made without the prejudice—and the necessary appeal—resulting from the HCFA ruling. Thus, even though ALJs were consistently awarding benefits when the Group brought this action, the interest asserted by the Group was not being vindicated in the course of administrative appeals. The Group's interest in receiving benefits without having its claims prejudged can only be vindicated by judicial review. Accordingly, immediate judicial review was appropriate in this case.[5]

CONCLUSION

Jurisdiction over the procedural claims was properly alleged under 28 U.S.C.A. § 1331 (West Supp. 1982), or 28 U.S.C. § 1361 (1976). Jurisdiction over the substantive claims was properly alleged under 42 U.S.C.A. § 405(g) (West Supp. 1982). The order dismissing for lack of jurisdiction is accordingly REVERSED, and the cause is REMANDED for further proceedings consistent with this opinion.

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[5] The Secretary argues that even though this argument may have been valid when ALJs were awarding benefits, it is no longer valid because claimants will be denied benefits on appeal and can therefore seek review of that denial following appeal. The Secretary does not indicate, however, why an appeal that is of no value to either the agency or the claimant should be required. *Cf. Weinberger v. Salfi*, 422 U.S. 749, 765–66, 95 S.Ct. 2457, 2467, 45 L.Ed.2d 522, 538–39 (1975) (appeal not required if futile for applicant and unsupported by any administrative or judicial interest).

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 80-4132 MRP

FREEMAN H. RINGER, ET AL., PLAINTIFFS

v.

PATRICIA ROBERTS HARRIS, DEFENDANT.

FILED: Feb. 18, 1981

ORDER GRANTING MOTION TO DISMISS

Defendant's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6) came on for hearing before the Court on December 15, 1980. Following oral argument, the motion was taken under submission.

FACTS

Plaintiffs are individuals who are eligible for health insurance benefits under Medicare and their physician, Dr. Winter ("Winter"). Winter has prescribed for plaintiffs a surgical procedure known as bilateral carotid body resection ("BCBR"). Plaintiffs Sanford Holmes, Norman R. Webster-Zieber, Dorothy Briggs and Jean Vescio (proposed "subclass A") have undergone this surgery and have filed claims for reimbursement of hospital fees as well as physician services. Plaintiff Freeman H. Ringer (proposed "subclass B") has not yet undergone the surgery, and, consequently, has filed no claim for reimbursement. Plaintiffs bring this action as a class action pursuant to Rule 23(b)(2); the plaintiff class has not yet been certified.

This case arises under Title XVIII of the Social Security Act, which established the federally funded health insurance program generally referred to as "Medicare." 42 U.S.C. § 1395 *et seq.* Claiming that the BCBR procedure is not reasonable and necessary for diagnosis or treatment of illness or injury, as required by 42 U.S.C. § 1395y(a)(1), the fiscal intermediary[1] has denied claims for reimbursement of hospital fees covering the procedure to the plaintiffs who have undergone the procedure (proposed subclass A).

Upon denial of benefits for hospital fees, a claimant has a right to a hearing before an Administrative Law Judge ("ALJ") in the Department of Health and Human Services ("HHS"), pursuant to 42 U.S.C. § 1395ff(b)(1). Although each of the named plaintiffs in proposed subclass A has requested an administrative hearing on the claim of beneifts for the BCBR procedure, none has received a ruling as of the date of this hearing. Some are awaiting a decision from the ALJ, while others are awaiting the hearing itself.

Following the issuance of HHS administrative decisions granting reimbursement to certain other claimants, none of whom are plaintiffs in the present case, the Health Care Financing Administration of the Medicare Bureau sought review by the Appeals Council. In its decision dated October 18, 1979, the Council explained that it "took jurisdiction" because of a March 1978 Task Force Report which cast doubt on the correctness of the ALJ's decision. Nevertheless, the Appeals Council held that the claimant-appellees were en-

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[1] Under the Medicare program, the actual reimbursement for the cost of medical services is usually effected through a "fiscal intermediary." These private, non-governmental entities serve as agents for the Department of Health and Human Services in the day to day administration of the Medicare program. *Pacific Coast Medical Enterprises v. Harris*, 633 F.2d 123, 126 (9th Cir. 1980).

titled to payments under Part A of Title XVIII for the services furnished during hospitalization for a bilateral carotid body resection. The Appeals Council cautioned that the decision was "not to be cited as precedent," because "[f]uture studies and data may compel a different conclusion." Decision of Appeals Council at 23, Exhibit A to Plaintiffs' Memorandum in Support of the Motion for Preliminary Injunction.

By letter dated March 6, 1980, defendant announced a formal ruling of the Health Care Financing Administration that BCBR, performed to relieve respiratory distress, is not a covered service. According to the HHS notice, this ruling merely restated the existing policy.

In this action, plaintiffs seek to enjoin the defendant from pursuing the current Medicare coverage policy which "forces eligible Medicare beneficiaries to pursue individual administrative appeals in order to obtain Medicare benefits for the BCBR procedure." Plaintiffs also seek an order compelling defendant to amend the Medicare manual to provide that BCBR is a reasonable and necessary treatment for obstructive pulmonary conditions.

DISCUSSION

The district court may not review the benefit decisions of the Secretary of the Department of Health and Human Services ("HHS") without prior exhaustion of administrative remedies. *Weinberger v. Salfi*, 442 U.S. 749 (1975); *Pacific Coast Medical Enterprises v. Harris*, 633 F.2d 123 (9th Cir. 1980). The failure to satisfy the requirement of administrative exhaustion deprives the court of federal question jurisdiction. It is the law in this circuit that the application of the requirement of exhaustion is not discretionary with the district court, and even the "appearance of futility will not waive the requirement." *Pacific Coast Medical Enterprises, supra* at 138. Indeed, in administrative hearings brought by the present plaintiffs, the position of

the Secretary as to the reasonableness and efficacy of the BCBR procedure may remain the same or may change as additional data is received and evaluated. On this state of the record, the Court cannot conclude that exhaustion of the administrative process would be futile.

The essence of plaintiffs' claim in the instant action is a claim of entitlement of benefits for the BCBR procedure. Although plaintiffs also advance a constitutional challenge founded on the rights to equal protection of the laws and substantive due process guaranteed by the Fifth Amendment of the United States Constitution, their constitutional attack upon the "vexatious" and "duplicative" appeals process is inextricably intertwined with their challenge of the validity of the determination denying them Medicare coverage. Where, as here, the constitutional claims are not "entirely collateral" to the substantive claims, the Court may not waive the requirement of administrative exhaustion. *See Mathews v. Eldridge*, 424 U.S. 319, 330-31 (1976) and *Weinberger v. Salfi*, *supra*. The requirement remains a prerequisite to judicial review.

Sections 405(g) and (h) of Title 42 provide the exclusive vehicle for appealing the merits of the Secretary's denial of Medicare reimbursement claims. 42 U.S.C. § 1395ff(b). None of the plaintiffs have completed this prerequisite to judicial review.

Plaintiffs appear to argue that they should not be required to exhaust their administrative remedies because the Secretary should be collaterally estopped to relitigate the issue of entitlement of reimbursement for hospital fees incurred as a result of the BCBR procedure. Since one hundred ninety-nine (199) claimants, none of whom are parties to the present action, have litigated the issue of entitlement to reimbursement in proceedings before the ALJ, plaintiffs contend that the doctrine of offensive collateral estoppel should apply in

the present case, as it did in *Continental Can Co. v. Marshall*, 603 F.2d 590 (7th Cir. 1979).

The Court has broad discretion in determining the propriety of the offensive use of collateral estoppel. *Parkland Hosiery Co. v. Shore*, 439 U.S. 322 (1979). This discretion should be exercised with caution where the doctrine is invoked to avoid the requirement that administrative remedies be exhausted. In this case, plaintiffs implicitly ask the Court to bypass a ruling by the ALJ on the issue of collateral estoppel on the assumption that, if summary judgment were sought on that issue, it would be erroneously denied in all cases. The Court is also asked to speculate on what, if anything, the Appeals Council would do in such a case. The Court refuses to engage in such conjecture.

In *Continental Can Co. v. Marshall*, 603 F.2d 590 (7th Cir. 1979), the case principally relied upon by plaintiffs, Continental had obtained a favorable decision against the Secretary of Labor ("Secretary") before the ALJ and the decision was affirmed by the Occupational Safety and Health Review Commission ("Commission"). Thereafter, the Secretary issued a second set of citations based on identical complaints involving the same facts, and Continental moved for summary judgment before the Commission on the ground of collateral estoppel. The Commission held that Continental did not satisfy the requirements for the application of collateral estoppel, denied its motions for summary judgment, and remanded the cases for hearing. The District Court enjoined the Secretary from prosecuting all pending and future citations against Continental and the Court of Appeals for the Seventh Circuit affirmed, stating that the Commission should have applied collateral estoppel to dispose of the remaining citations against Continental and that relitigating the issue was harassment in violation of due process.

Here, not only has there been no adjudication of the issue of collateral estoppel in the administrative proceedings as there was in *Continental Can Co. v. Marshall*, *supra*, but in this factual setting, it is doubtful that the doctrine is even applicable. As stated above, the Appeals Council has cautioned that its decision should not be regarded as precedent. In addition, it is certainly possible that the rulings of the ALJ may vary from case to case based on the medical histories, diagnoses and needs of the individuals involved. Under these circumstances, the proceedings before the ALJ and the Appeals Council are the appropriate forum for determining the reasonableness and necessity of the BCBR procedure and the propriety of the application of collateral estoppel in reaching that determination. If the ALJ and the Appeals Council err, redress can be sought in the District Court after exhaustion of the administrative remedies. Since the plaintiffs have failed to satisfy the requirement of administrative exhaustion, the Court is without jurisdiction under Title XVIII of the Social Security Act, 42 U.S.C. § 1395 *et seq.*

As the final point, the Court finds no merit in the contention that the federal mandamus statute, 28 U.S.C. § 1361, provides a basis for the Court's jurisdiction over members of proposed subclass B, the plaintiffs who have not undergone the BCBR procedure. Although § 405 does not necessarily preclude mandamus jurisdiction, mandamus jurisdiction is precluded where, as here, the claim for benefits is not entirely divorced from due process questions. *Elliott v. Weinberger*, 564 F.2d 1219, 1226-27 (9th Cir. 1977). Mandamus is appropriate only if "the claim is clear and certain and the duty of the officer is ministerial and so plainly prescribed as to be free from doubt." *Id.* at 1226. Mandamus will not lie where, as here, these traditional requirements are not satisfied. Accordingly,

IT IS HEREBY ORDERED that the above entitled cause is hereby dismissed for want of jurisdiction of the subject matter, pursuant to Fed.R.Civ.P. 12(h)(3).

/s/ MARIANA R. PFAELZER
MARIANA R. PFAELZER
United States District Judge

DATED: FEBRUARY 12, 1981

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-5413
D.C. No. 80-04132

FREEMAN H. RINGER, SANFORD HOLMES, NORMAN R. WEBSTER-ZEIBER, AND JEAN VESCIO, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED, AND BENJAMIN WINTER, M.D., PLAINTIFFS-APPELLANTS,

v.

RICHARD S. SCHWEIKER, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLEE.

FILED DEC. 30, 1982

ORDER

Before: NELSON and REINHARD, Circuit Judges, and EAST,* Senior District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no active judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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*Honorable William G. East, Senior United States District Judge, District of Oregon, sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-5413
DC# CV 80-4132 MRP

FREEMAN H. RINGER, SANFORD HOLMES, NORMAN R. WEBSTER-ZEIBER, AND JEAN VESCIO, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED, AND BENJAMIN WINTER, M.D., PLAINTIFFS-APPELLANTS,

v.

RICHARD S. SCHWEIKER, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT/APPELLEE.

APPEAL from the United States District Court for the Central District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of said District Court in this Cause be, and hereby is REVERSED and REMANDED.

Filed and entered AUGUST 19, 1982

APPENDIX E

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 1331 provides:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency, thereof, or any officer or employee thereof in his official capacity.
>
> (b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

2. 28 U.S.C. 1361 provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

3. Sections 205(g) and (h) of the Social Security Act, as codified at 42 U.S.C. (& Supp. V) 405 (g) and (h), provide in relevant part:

> **(g) Judicial review**
>
> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such fur-

ther time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive.

* * *

(h) Finality of Secretary's decision

The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under sections 1331 or 1346 of title 28 to recover on any claim arising under this subchapter.

4. Section 1869 of the Social Security Act, 42 U.S.C. 1395ff(a) and (b), provides in pertinent part:

§ 1395ff. Determinations of Secretary

(a) Entitlement to and amount of benefits

The determination of whether an individual is entitled to benefits under part A or part B, and the determination of the amount of benefits under part A, shall be made by the Secretary in accordance with regulations prescribed by him.

(b) Appeal by individuals

(1) Any individual dissatisfied with any determination under subsection (a) of this section as to—

(A) whether he meets the conditions of section 426 or section 426a of this title, or

(B) whether he is eligible to enroll and has enrolled pursuant to the provisions of part B of this subchapter, or section 1395i-2 of this title, or section 1819, or

(C) the amount of benefits under part A (including a determination where such amount is determined to be zero)

shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title.

(2) notwithstanding the provisions of subparagraph (c) of paragraph (1) of this subsection, a hearing shall not be available to an individual by reason of such subparagraph (C) if the amount in controversy is less than $100; nor shall judicial review be available to an individual by reason of such subparagraph (C) if the amount in controversy is less than $1,000.

* * *

Office-Supreme Court, U.S.
FILED
SEP 16 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1772

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

FREEMAN H. RINGER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED APRIL 29, 1983
CERTIORARI GRANTED JUNE 27, 1983

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*The opinions of the court of appeals and the district court appear in the appendix to the petition for a writ of certiorari and have not been reproduced.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV80-4132 MRP

FREEMAN H. RINGER

v.

PATRICIA ROBERTS HARRIS, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES

RELEVANT DOCKET ENTRIES

9-18-80	1. Fld complt, Issd sms Case may be ref to Mag Geffen LODGED prop ord
	2 Fld pltfs notc of mtn to certify class rtnbl 10-06-80, 9:30AM
	3 Fld pltfs motn to certify class
	4 Fld pltfs memo in supp of pltfs mtn to certify class
	5 Fld pltfs notc of mtn for prelim inj rtnbl 10-06-80, 9:30AM LODGED prop ord
	6 Fld pltfs memo in supp of pltfs mtn for prelim inj
	7 Fld pltfs mtn for waiver of inj bond
9-19-80	8 Fld pltfs applic & ORD allowng Malcolm J. Harkins, III to appear as non-res atty desig Manfred Rosenfeld
	9 Fld pltfs applic & ORD allowng Joseph L. Bianculli to appear as non-residnt desig Manfred Rosenfeld
	10 Fld pltfs applic & ORD allowng Barry S. Landsberg to appear as non-residnt atty desig Manfred Rosenfeld
10-03-80	11. Fld Stip & ORD to cont hrg date to 10-27-80 at 9:30 am, deft said mots by 10-16-80 & pltfs shl reply to such resp by 10-23-80
10-16-80	12. Fld opp to pltfs mot for prelim injunc
10-17-80	13. Fld defts notc of mot & mot to dism-rtbnl 11-10-80 at (;30am [*sic*]
10-21-80	14. Fld defts supple memo in opp to pltfs mot for prelim injunc

15. Fld defts non opp to mot for class certification

10-24-80 16. Fld pltfs memo in reply to defts opp to pltfs mot for prelim & in suppt of pltfs mot to strk

10-27-80 17. MIN ORD: exhbts mkd & admt, crt grnts pltf lv to file his mot to the complnt & notc said mot for 11-24-80, csnl for defts to tk two crt ords defts mot to dism now set for 11-20-80 cont to 11-24-80 mot for prelim injunc & mot to cert class cont to 11-24-80 at 9:30 cnsl to file a stip for the schedule for filing fur papers, all p to be fld on or bf 11-20-80, cnsl to call clk for a date & ti for w/o filing any fur papers

11-07-80 18. Fld pltfs mot to strke affrm defenses

19. Fld pltfs memo in reply to defts opp to pltfs mot for prelim & in opp to defts mot to dism & in suppt of pltfs mot to strk

20. Fld pltfs notc of appearance

21. Fld pltfs notc of mot -rtnbl 11-24-80 10am

22. Fld pltfs mot to amd complnt-rntbl 11-24-80 10am LODGED-pltfs first amd verified class actn complnt-prelim inj relief sought

LODGED-pltfs ord

LODGED-pltfs ord

11-10-80 23. Fld Stip & ORD tht pltfs wil file their mot to A/C & other m & reply to defts mot to dism by 11-4-80, defts wil file any reply or resp to the pldngs by 11-13-80, all ptys wil file any fur pa by 12n00n 11-20-80, depo of B. Winter M.D. wil be conducted NLT 11-

11-13-80 24. Fld notc to cnsl tht effect 11-1-80 procs in judge Pfaelzers wil be govnd by the FRCP for the Central Dist.

25. Fld notc of cont of the defts mot to dism, prelim inj, mot to class etc to 12-8-80 at 10am

11-14-80 26. Fld defts memo in reply to pltfs memo in opp to deft mot to d & in opp to pltfs mot to srtk

27. MIN ORD: crt & cnsl discuss depo of expert, crt ords tht the d expert can be present for the tkng of defp of the pltfs ecpert, crt fur ords tht the depo wil cont in Wash, D.C. until completed

11-21-80 28. Fld Stip & ORD defts mot to dism shl be hrd on 12-15-80 at 10am & all memo fld in reply bf 12-4-80

12-04-80 29. Fld pltfs mot to compel disov

	LODGED-ord of pltf
12-08-80	30. Fld pltfs reply to defts reply to pltfs opp to defts mot to dism
12-11-80	31. Fld defts supple brief in opp to pltfs mot for a prelim inj
	32. Fld defts notc of filing of Claude Lenfant M.D.
12-12-80	33. Fld PORTION of DEPOSITION of Benjamin Winter M.D. FILED & PLACED UNDER SEAL
12-12-80	34. Fld defts notc of filing depo of Benjamin Winter M.D.
12-15-80	35. MIN ORD: crt tks defts mot to dism under subm, pltfs mot to comp discov moot & ord off cal, pltfs mot s to certify class, to amd complnt, & to strk to be reset af ruling mot to dism
12-12-80	Fld DEPOSITIONS tkn on 11-14-80 & 12-1-80 of Caludie Lenfart M.D. & Benjamin Winter M.D. on 11-14-80
2-05-81	36. Fld pltfs subst of aty Hugh Steven Wilson & Karen Leviton of Latham & Watkins
2-13-81	37. Fld defts req fr disml & ORD (MRP) dismg complt. (ENT 2/17/81) Mld cpyies to parties. MD JS-6
*2-27-81	39. Fld pltfs notc of mot fr reconsideratn of dismal retnbl 3/23/81 10 AM
	LODEGD [sic] pltf proposd ord to vacate ord of 2/12/81 & that defts mot to dism denied
	41. Fld deft opp to mot fr reconsideratn
3-19-81	42. Fld pltfs reply to opp to mot fr reconsideratn
3-23-81	43. MIN ORD: Pltfs mot fr reconsideratn of dismal tkn under subm by crt
4-15-81	44. Fld ORD(MRP) that pltfs ti to fi notc of appeal fm this crt's ORD of 2/16/81 ext to 5/15/81
	45. Fld pltfs ex parte mot to ext ti fr filing notc of appeal to 5/15/81
5-15-81	46. Fld plfts NOTC OF APPEAL to the 9th Cir. C/A fr ORD of dsml ent on 2/16/81; $70.00 Clks' fee & docket fee paid.
6-03-81	48. Fld pltfs notc of motn for injunctn pending appeal retnbl 7-6-81, 10AM LODGED prop ORD
6-11-81	49. Fld pltfs opp to motn for inj pending appeal
7-06-81	50. MIN ORD: pltf motn fr inj pending appeal under submission

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-5413

FREEMAN H. RINGER, ET AL., PLAINTIFFS/APPELLANTS

v.

RICHARD S. SCHWEIKER, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES

RELEVANT DOCKET ENTRIES

1981	
MAY 30	DOCKETED CAUSE AND ENTERED APPEARANCE OF COUNSEL. ers
June 3	Filed, as of May 30, aplts' motion for selection to "Appeals Without Briefs Project". (CIVATT) 5/22
June 3	Filed, as of June 1, aple's opposition to aplts' motion for selection to "Appeals Without Briefs Project" (CIVATT) 5/28
June 11	Filed aplts' reply to aple's opposition to aplt's motion for selection to "Appeals Without Briefs Project" (CIVATT) 6/10
June 25	Filed order (SNEED & POOLE) upon due consideration of aplts' motion for selection to the appeals without briefs project and aple's opposition thereto, the motion is denied.
July 1	FILED AMENDED CERT OF RECORD (rec'd 6-22-81) (6/8/81 & 6/15/81)
Aug 10	*Filed orig & 15 Aplts' opening briefs & Excerpt of Record. 8/7
Aug 31	Filed appellants' motion for injunction pending appeal, or in the alternative, for expedited hearing. 8/27 (CIVATT)
Sept 1	Filed, as of Aug. 31, aple's motion for ext of time to file brief. (CIVATT) 8/31
Sept 3	Filed order (Motions Atty) granting ext to file aple's brief to be filed on or before Oct. 7, 1981. This order is subject to reconsideration by a judge if any opposition is filed w/in ten (10) days of the entry of the order.

Sept 9	Filed aple's motion for ext of time to file opposition to aplts' motion for injunction pending appeal. (CIVATT) 9/4
Sept 11	Rec'd aple's opposition to aplts' motion for injunction pending appeal. (motion for ext of time to file pending) (CIVATT) 9/10
Sept 24	Filed order (PREGERSON & FERGUSON) aple's motion for ext of time to respond to aplts' motion for injunction pending appeal is granted, and the opposition, heretofore rec'd, is ordered filed. Aplts' motion for an injunction pending appeal is denied as aplts failed to demonstrate a sufficient likelihood of success on the merits and the requisite balance of hardships to warrant interim relief. Aplts' alternative motion for an expedited appeal is granted, and the clerk is directed to calendar this case for argument as soon as practicable after briefing is completed. MOCAL 9/21/81
Sept 24	Filed aple's opposition to aplts' motion for injunction pending appeal. (rec'd 9/11/81)
Oct 13	Fld mtn & ord(CLK) gntg appellee an ext of time to file the answering brief to: 10-14-81.
Oct 15	Filed orig & 15 aple's briefs. (10/14)
Nov 6	Filed orig & 15 aplts' reply briefs. (11/2)
Nov 17	FILED AS OF 7/1/81, CERTIFIED RECORD ON APPEAL IN FOUR VOLUMES: PLEADINGS, VOLUMES I THRU III, ONE COPY ONLY; R/T, VOLUME IV, ORIGINAL ONLY.
Nov 18	Filed, as of Nov 13, aplts' motion to supplement the record on appeal with administrative record. (CIVATT) 11/10 CALENDARED Los Angeles 8 Jan 1982
Nov 25	Filed order (Mt Atty for Ct) aplts' motion to supplement the record to include the administrative record, including the hearing transcript, in HEW Appeals Counsel case No. 126-12-3830, *In re: Ferguson*, is granted. Aplts shall promptly arrange to supplement the record. This order is subject to reconsideration by a judge if any opposition is filed within ten (10) days of the entry of this order.
Dec 28	Filed aplts' motion to supplement record. 12/23 (panel)

Dec 30	Filed appellee's application for ext of time to file response to aplts' motion to supplement record on appeal. 12/29 (panel)
1982	
Jan 7	Recvd aple's statement of non-opposition to aplts' motion to supplement record on appeal. 1/5 (not sent to panel, see Order of 1/5/82)
Jan 7	Filed as of Jan. 5, Order by Depty Clk-for the Ct.(in LA) Aplts' motion to supplement the record on appeal is granted. The Clk of the USDC for the Central Dist. of CA is requested to supplement the record on appeal with the following: (SEE CASE FILE). The Clk of DC is directed to deliver the documents to USCA, LA Div. Office on or before Jan. 7, 1982. The motion by aple for ext of time to file response to aplts' motion to supplement the record on appeal is denied.
Jan 7	FILED CERTIFIED SUPPLEMENTAL RECORD ON APPEAL IN TWO VOLUMES OF REPORTER'S TRANSCRIPTS, VOLUMES V AND VI (ORIGINAL ONLY). *RECORD NOW IN SIX VOLUMES.*
Jan 8	ARGUED AND SUBMITTED BEFORE: NELSON, REINHARDT, CJJ & EAST, DJ
FEb 8	Rec'd ltr dtd Feb 2, from counsel for aplt, re: advising court of recent developments which are pertinent and significant to the issues raised in this appeal. (panel)
FEb 8	Rec'd ltr dtd Feb 5, from counsel for Schweiker, re: additional citations. (panel)
Mar 15	R'cvd copies of additional citations (Administrative decision) from aplts' counsel. (3/8) (panel)
Mar 15	R'cvd aple's letter in response to aplts' letter of 3/8, re: administrative decision. (3/12) (panel)
April 5	Rec'd ltr dtd April 2, from counsel for aplts, re: enclosing additional dismissals, entered without hearings, of Medicare Claims for reimbursement for bilateral carotid body resection. (panel)
April 23	Rec'd as of April 19, ltr dtd Apr 13, from counsel for aplts, re: enclosing additional dismissals, entered without hearings, of Medicare Claims for reimbursement for bilateral carotid body resection. (panel)

May 3	Rec'd ltr dtd April 30, from counsel for aple, re: additional citations. (panel)
May 18	Rec'd as of May 17, ltr dtd May 10, from counsel for aplts, re: informing Court of further administrative developments pertinent to this case. (panel)
May 24	Rec'd ltr dtd May 19, from counsel for aplts, re: informing court of further administrative developments pertinent to this case. (panel)
June 7	Rec'd ltr dtd June 3, from counsel for aplts, re: advising Court of further administrative development pertinent to this case. (panel)
June 18	Rec'd ltr dtd June 15, from counsel, for aplts, re: advising Court of further administrative developments pertinent to this case. (panel)
Aug 19	ORDERED OPINION (NELSON) FILED & JUDG TO BE FILED & ENTD.-db-
Aug 19	Filed opinion-reversed & remanded.
Aug 19	FILED & ENTERED JUDGMENT.
Aug 27	Filed Motion & Order (Clk for Court) granting appellee an ext of time to Oct. 2, 1982, within which to file petition for rehearing and/or suggestion for rehearing en banc. (panel)
Sept 2	Filed aplts' bill of costs. 9/1
Oct 1	Filed Orig & 33 Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc. (Panel, active judges) 9/30
Dec 30	Filed order (*Nelson*, Reinhardt, CCJ, and East, Senior D.J.) amending opinion filed August 19, 1982, as follows:
1983	
JAN 4	Filed as of 12/30/82 Order (NELSON, REINHARDT, EAST) The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc. The full court has been advised of the suggestion for an en banc hearing, and no active judge of the court has requested a vote on the suggestion for rehearing en banc. The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected. PLS Hold Mandate (per power)
Jan. 11	Filed as of Jan. 10, aples' motion for clarification of opinion as amended; memorandum of points and

authorities in support of motion for clarification of opinion as amended. (Panel) 1/7

Jan. 12 Re'cd aple's motion for stay of mandate, or in the alternative, for recall and stay of mandate; memorandum of points and authorities thereon; (Nelson) 1/11

Feb 1 FILED ORDER (NELSON, REINHARDT, CJ & EAST, SR.DJ) AMENDING OPINION AMENDED DECEMBER 30, 1982.

MAR 18 1983 MANDATE ISSUED

May 27 RECVD SC notice of filing of petition for writ of cert on 4/29/83, SC#82-1772.

July 1 Filed certified copy of sC order of 6/27/83, granting cert. (COPIES TO PANEL)

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IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil Action No.
CV-80-04132-MRP (Gx)

First Amended Verified Class Action Complaint. Preliminary Injunctive Relief Sought.

FREEMAN H. RINGER, SANFORD HOLMES, NORMAN R. WEBSTER-ZIEBER, AND JEAN VESICO, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,
AND
BENJAMIN WINTER, M.D., PLAINTIFFS,

v.

PATRICIA ROBERTS HARRIS, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, AND HUMAN SERVICES, DEFENDANT.

VERIFIED CLASS ACTION COMPLAINT FOR INJUNCTIVE RELIEF AND DECLARATORY JUDGMENT.

INTRODUCTION

1. This action is brought to enjoin the defendant from adhering to a Medicare coverage policy which forces eligible Medicare beneficiaries to pursue individual administra-

tive appeals in order to obtain Medicare insurance benefits for the surgical procedure bilateral carotid body resection ("BCBR") when in every one of approximately 170 cases decided to date, HHS administrative law judges and the Appeals Council have ruled that BCBR is reasonable and necessary and that Medicare must pay the cost of such treatment. In addition, plaintiffs ask this Court to prevent defendant from using her policy of publicly refusing Medicare coverage for BCBR, and the prospect of lengthy appeals to contest such policy and obtain Medicare benefits, to discourage or to prevent qualified elderly and disabled Medicare beneficiaries from obtaining BCBR when medically reasonable and necessary to relieve the symptoms of asthma, emphysema and chronic bronchitis, to improve their overall physical health, restore the quality of life or prevent premature death.

JURISDICTION AND VENUE

2. This is a civil action arising under the laws of the United States, specifically the Medicare Act, 42 U.S.C. § 1395 *et seq.*, the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, and the First, Fourth, Fifth and Ninth Amendments to the United States Constitution. This Court has jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1361 and 42 U.S.C. § 405(g). In addition, a declaratory judgment under 28 U.S.C. § 2201 *et seq.* is sought to determine the respective rights of the parties.

3. Venue is properly laid in the United States District Court for the Central District of California by virtue of 28 U.S.C. §§ 1391(b) and (e).

PARTIES

4. Plaintiff Freeman H. Ringer, who is 68 years of age, suffers from severe, chronic obstructive airways disease, (*i.e.*, severe emphysema), cor pulmonale and right heart strain. Plaintiff Ringer is eligible for health insurance benefits under the Medicare program, including both benefits for inpatient hospital services (Part A) and for physician services (Part B). His physician, the plaintiff Benjamin Winter, M.D., has prescribed BCBR surgery but plaintiff Ringer is unable to pay the cost of the surgery and is there-

fore prevented from obtaining the surgery by defendant's irrefutable presumption that BCBR is never reasonable and necessary and therefore never covered by the Medicare Program.

5. Plaintiff Sanford Holmes, who is 66 years of age, suffers from severe chronic obstructive airways disease (emphysema). Plaintiff Norman R. Webster-Zieber, age 66, suffers from emphysema. Plaintiff Jean Vescio is 66 years old and suffers from severe emphysema, chronic bronchitis and ashthma. Plaintiffs Holmes, Webster-Zieber and Vescio are eligible for both Part A (inpatient hospitalization) and Part B (physician's services) health insurance benefits under the Medicare Program. Their physician prescribed BCBR and each plaintiff successfully underwent such surgery. Plaintiffs Holmes, Webster-Zieber and Vescio have each filed a claim with a fiscal intermediary administering the Medicare Program on defendant's behalf for hospitalization (Part A) benefits under the Medicare Act. Acting upon instructions from defendant, the fiscal intermediary has denied the Part A claims of plaintiffs Holmes and Webster-Zieber. A claim for reimbursement of physicians' fee incurred by Plaintiffs Holmes and Webster-Zieber and Vescio as a part of the cost of BCBR surgery has also been filed. The Part B claims of plaintiffs Holmes and Webster-Zieber have been denied by the carrier acting under instructions from the defendant. Plaintiffs Holmes and Webster-Zieber have requested and either are awaiting administrative hearings on their Part A claims, or have had such hearings and are awaiting a decision.

6. Plaintiff Benjamin Winter, M.D., is a physician licensed to practice medicine in the State of California and is a specialist in chest and heart surgery. In 1962 he developed the "Winter technique" of BCBR and since then has performed this operation approximately 1,000 times. Dr. Winter prescribes BCBR to alleviate the symptoms of severe, chronic obstructive pulmonary conditions, including asthma, chronic bronchitis, and emphysema. Dr. Winter has studied extensively the effects of BCBR surgery and has published numerous articles and reports on the subject in the professional journals.

7. Defendant Patricia Roberts Harris (hereinafter the "Secretary"), is the Secretary of the United States Department of Health and Human Services. The Secretary is sued herein in her official capacity. The Secretary administers the Medicare Program through the Health Care Financing Administration and various private organizations called "fiscal intermediaries" and "carriers" (hereinafter collectively referred to as the "Department").

CLASS ACTION

8. The named plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and on behalf of a class of all similarly situated beneficiaries of the Medicare Program for whom BCBR has been prescribed and who have obtained or desire to obtain such surgery for relief of chronic obstructive lung disease including: 1) those beneficiaries for whom BCBR is medically indicated, who desire to obtain such treatment but who have been prevented from obtaining BCBR by the Secretary's policy; 2) those beneficiaries who have been dissuaded or prevented from having BCBR by the Secretary's policy of refusing coverage for BCBR who have sought and been denied such benefits before undergoing BCBR surgery; and 3) those beneficiaries awaiting an administrative hearing who have had BCBR and thereafter have been denied payment initially for the hospital and physician costs of such surgery by the department pursuant to defendant's policy statement.

9. The class is so numerous that joinder of all members is impracticable. There are questions of law or fact common to the class. The claims asserted by the representative parties are typical of the claims of the class and the representative parties will fairly and adequately protect the interests of the class.

10. Defendant has acted or refused to act on grounds generally applicable to the class and the class seeks injunctive and declaratory relief with respect to the entire class.

STATUTORY AND REGULATORY BACKGROUND

11. The Medicare Act, 42 U.S.C. § 1395 *et seq.*, entitles eligible beneficiaries to payment of the costs of both inpa-

tient hospital and physician services ("Part A"). The Act also establishes a voluntary insurance program which provides benefits for other medical and health care services, including non-hospital physician services ("Part B").

12. The Medicare Act, 42 U.S.C. § 1395y(a)(1), excludes from coverage services "which are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member." The regulation at 42 C.F.R. § 405.310(k) contains language similar to that found in the above statutory provision.

13. The Medicare Act, 42 U.S.C. § 1395, also provides in part as follows:

> Nothing in this title shall be construed to authorize any federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided....

14. Defendant has published documents entitled "Medicare Carriers Manual" and "Medicare Intermediary Manual." Each manual purports to contain guidelines governing the operations of the Medicare Program by the Secretary and her fiscal agents. Both manuals identify the surgical procedure bilateral carotid body resection (BCBR) for the purpose of treating patients with obstructive pulmonary diseases as a procedure not covered under Medicare.

15. The Manuals have not been promulgated as regulations, but the fiscal agents which administer the Medicare program on defendant's behalf are bound absolutely by the Manuals and, therefore, routinely deny hospital insurance benefits for BCBR surgery without considering whether the BCBR surgery was actually "reasonable or necessary" in the care and treatment of the individual claimant under the 42 U.S.C. § 1395(y)(a)(1) and 42 C.F.R. § 405.310(k).

16. After a Medicare claimant has been denied insurance benefits (Part A) for BCBR surgery by the fiscal intermediary, the claimant has the right to a hearing before an HHS Administrative Law Judge pursuant to 42 U.S.C. § 405(g) and 42 C.F.R. § 405.1530 and § 405.1533. Administrative Law Judges are not bound by the provisions of the Inter-

mediary Manual but are obliged to adjudicate appeals applying the Medicare Act and its implementing regulations. To date, Medicare beneficiaries have appealed over 200 cases in which HHS refused to cover the cost of BCBR. In every one of approximately 170 cases decided to date, HHS Administrative Law Judges have found that the BCBR surgery was reasonable and necessary treatment for the chronic obstructive airways diseases from which the claimant suffered and ordered that HHS must pay the inpatient hospital cost component of such treatment.

17. After a beneficiary is denied Part B benefits initially and upon review by defendant or her fiscal agent (*i.e.*, a "carrier") the only administrative review available for plaintiffs' Part B claims is an appeal to a hearing officer appointed and employed by the fiscal agent. Because the hearing officer is bound by the Manuals and has no authority to disregard defendant's BCBR policy and determine that a procedure was reasonable and necessary and must be covered, such an appeal offers neither an effective nor an adequate remedy. Due to the lack of effective appeal mechanisms, plaintiffs' claims for Part B reimbursement are routinely denied. Defendant has not paid Part B reimbursement even in those cases in which BCBR has been finally ruled reasonable and necessary in Part A hearings.

18. The HHS Appeals Council possesses the power to review Part A decisions of the Administrative Law Judges on its own motion, even if favorable to the beneficiary. 42 C.F.R. §405.1570. The Appeals Council on its own motion may also remove to itself any pending request for a hearing before an Administrative Law Judge. 42 C.F.R. § 405.1559.

19. Following numerous reversals of the defendants' presumptive denial of Part A benefits for BCBR surgery by the Administrative Law Judges, defendant, through the Health Care Financing Administration, requested the Appeals Council to review approximately 70 of the decisions. At a hearing held on May 1, 2, and 3, 1979, the Appeals Council heard expert medical testimony and legal arguments from all interested parties, including the Secretary.

20. In a 24-page written decision the Appeals Council concluded that "in view of the various opinions and expressions of professional judgment brought to its attention, the Appeals Council will find that the bilateral carotid body resection operations performed in these cases were reasonable and necessary." (Exhibit A).

21. In reaching the conclusion that the BCBR procedure was reasonable and necessary in the cases under review the Appeals Council found that BCBR enhanced the quality of the claimants' life and that patients undergoing BCBR did not evince a greater mortality rate than those patients under medical management.

22. Despite the decisions of the Administrative Law Judges and the decision of the Appeals Council, defendant continues to apply an irrefutable presumption that BCBR surgery is never reasonable and necessary and to deny benefits routinely under both Part A and Part B for BCBR surgery.

23. By letter dated March 6, 1980 the Secretary reissued her previous BCBR policy and announced that HHS would continue to deny benefits for BCBR and that Medicare would pay the cost of BCBR only when ordered to do so by the Administrative Law Judges and Appeals Council. Such decision is a final decision from which there is no further administrative appeal.

24. On October 16, 1980 the Administrator of the Health Care Financing Administration signed and issued for publication in the *Federal Register* a Health Care Financing Administration Ruling ("HCFA BCBR Ruling") that restates defendant's policy precluding Medicare coverage of BCBR.

25. Plaintiffs are persons aggrieved by final agency action. Plaintiffs have exhausted all available administrative remedies. No further adequate or effective avenues of administrative relief are available to plaintiffs.

IRREPARABLE INJURY

26. As a result of defendant's irrefutable presumption denying Medicare health insurance benefits for hospital and other expenses incurred in providing BCBR surgery, eligible Medicare beneficiaries such as plaintiffs Ringer,

Holmes, Webster-Zieber, Vescio, and other of Dr. Winter's patients are being denied their statutory rights to prompt payment of insurance benefits for reasonable and necessary medical treatment prescribed by their physician. Plaintiffs Ringer, Holmes, Webster-Zieber, Vescio, and the class they and Dr. Winter represent also are being compelled by defendants' actions to forego needed medical treatment against their wills and against their physicians' professional advice, thus diminishing their quality of life and risking an immediate deprivation of life itself in violation of their statutory and constitutional rights.

27. Without this Court's intervention, defendants will continue to cause irreparable injury to eligible Medicare beneficiaries who are in need of BCBR surgery but who are compelled to forego such surgery because of defendants' illegal action.

28. Without this Court's intervention the plaintiff Dr. Winter will suffer irreparable injury and interference with his practice of medicine and with his physician-patient relationships in violation of his statutory and constitutional rights.

COUNT ONE.

29. Paragraphs 1-28 are incorporated herein by reference.

30. Defendant's policy of routinely and presumptively denying the Medicare benefits, described above, is illegal, arbitrary, capricious, irrational and deprives plaintiffs of due process of law in violation of the Fifth Amendment to the United States Constitution.

COUNT TWO.

31. Paragraphs 1-30 are incorporated herein by reference.

32. Defendant's action of presumptively denying health insurance benefits to eligible Medicare beneficiaries for hospital costs incurred in providing BCBR surgery ignores and is contrary to every decision of HHS's own Administrative Law Judges and to the decision of the Appeals Council addressing the issue of Medicare coverage of BCBR sur-

gery. These decisions have found, without exception, that BCBR surgery is a reasonable and necessary treatment for obstructive pulmonary conditions.

33. By continuing to deny Medicare coverage of BCBR surgery based on a policy which has been rejected in every one of approximately 170 decisions of the Administrative Law Judges and the Appeals Council, the defendants have violated the Administrative Procedure Act, 5 U.S.C. § 706(2), and have acted arbitrarily, capriciously and beyond their statutory authority.

COUNT THREE.

34. Paragraphs 1-33 are incorporated herein by reference.

35. Notwithstanding defendant's policy denying Medicare coverage of BCBR, 100% of those beneficiaries undergoing the procedure and pursuing an administrative appeal to HHS' Bureau of Hearings and Appeals ("BHA") have been determined to be entitled to Medicare (Part A) benefits for hospitalization costs incurred to obtain BCBR.

36. Defendant's reaffirmation and adherence to its policy absolutely precluding Medicare coverage of BCBR illegally penalizes and discriminates against Medicare beneficiaries who have or desire to obtain BCBR by requiring such patients to pursue individual administrative appeals to obtain benefits to which HHS's administrative law judges and Appeals Council have consistently ruled such beneficiaries are entitled while not imposing such burden on any other group of Medicare beneficiaries receiving covered services.

37. Further, defendant's policy precluding Medicare coverage of the costs of BCBR unless payment is ordered by the Appeals Council or by an administrative law judge applies two standards of eligibility for Medicare benefits, one for beneficiaries who seek a hearing before an administrative law judge and one for beneficiaries who do not or are unable to obtain a hearing before an administrative law judge.

38. Defendant's BCBR policy and the burdens which such policy imposes on Medicare beneficiaries claiming benefits for BCBR are justified by no legitimate governmental

interest, rest upon no reasonable basis and bear no rational relation to the purposes of the Medicare Act.

39. Defendant's policy arbitrarily and illegally discriminates against Medicare beneficiaries such as plaintiffs claiming Part A or Part B benefits for BCBR or desiring to obtain such treatment, and denies plaintiffs and the members of the class they represent equal protection of the laws in violation of the Fifth Amendment to the Constitution of the United States.

COUNT FOUR.

40. Paragraphs 1-39 are incorporated herein by reference.

41. Defendant's failure to revise her policy to permit Medicare coverage of BCBR without requiring all claimants for such benefits to pursue individual appeals violates the mandate of 42 U.S.C. § 405(a) that the defendant adopt reasonable rules to establish the right to benefits under the Medicare Program and renders defendant's policy null and void.

COUNT FIVE.

42. Paragraphs 1-41 are incorporated herein by reference.

43. Defendant's denial of health insurance benefits to eligible Medicare beneficiaries for hospital costs incurred in providing BCBR surgery compels eligible Medicare beneficiaries to endure uncertain, extremely protracted and unreasonable appeals in order to receive their entitled benefits.

44. These delays and accompanying expenses are so unreasonable that they have compelled plaintiff Ringer and the class which he represents to forego needed medical treatment rather than endure such administrative delay and absorb such expenses.

45. Defendant's actions violate the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, which provides that "[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it . . .," 5 U.S.C. § 555(b), and brings into play

the statutory command and that the reviewing court "shall ... (1) compel agency action unlawfully withheld or unreasonably delayed ...." 5 U.S.C. § 706(1).

COUNT SIX.

46. Paragraphs 1-45 are incorporated herein by reference.

47. Defendant's action of presumptively denying health insurance benefits to eligible Medicare beneficiaries based on an irrebutable presumption that BCBR surgery is never reasonable and necessary without consideration of the individual claimant's physical condition violates the Medicare Act, 42 U.S.C. § 1395y(a)(1), and the corresponding regulation, 42 C.F.R. § 405.310(k), which require the Secretary to pay insurance benefits for hospital services which are reasonable and necessary for the treatment of illness or injury.

COUNT SEVEN.

48. Paragraphs 1-47 are incorporated herein by reference.

49. Defendant's action of presumptively denying health insurance benefits to eligible Medicare beneficiaries for hospital costs incurred in providing BCBR surgery is founded upon defendants' view that BCBR surgery is never appropriate or necessary medical treatment.

50. Denial of Medicare coverage for BCBR surgery has compelled the plaintiff Ringer and the class which he represents to forego necessary and reasonable medical treatment contrary to the advice of their physicians and has needlessly and unlawfully interjected defendants' views on the practice of medicine into the relationship between patient and physician.

51. Defendant's actions violate the Medicare Act, 42 U.S.C. § 1395, in that defendants are unlawfully "exercis[ing] ... supervision or control over the practice of medicine or the manner in which medical services are provided...."

COUNT EIGHT.

52. Paragraphs 1-51 are incorporated herein by reference.

53. Defendant's action has a chilling effect on the relationship between patient and physician by causing patients to forego prescribed medical treatment for reasons other than the patient's physical and emotional health.

54. Defendant's action also has a chilling effect on the practice of medicine and on innovation in medical practices by presumptively denying benefits for BCBR surgery solely because of defendant's view that such surgery is never appropriate or efficacious.

55. Defendant's action unconstitutionally interferes with the practice of medicine and the patient-physician relationship in violation of the First, Fourth, Fifth and Ninth Amendments to the United States Constitution.

COUNT NINE.

56. Paragraphs 1-55 are incorporated herein by reference.

57. Section 205(a) of the Social Security Act, 42 U.S.C. § 405(a), applicable to the Medicare Program by virtue of Section 1872, 42 U.S.C. § 1395ii, mandates that defendant "shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proof and evidence and the method of taking and furnishing the same ... in order to establish the rights to benefits hereunder".

58. Defendant's failure to promulgate her policy statement governing Medicare coverage of BCBR pursuant to the rulemaking requirements of the Administrative Procedure Act violates the mandate of 42 U.S.C. § 405(a) that the Secretary adopt proper rules establishing the right to benefits and renders such policy null and void.

COUNT TEN.

59. Paragraphs 1-58 are incorporated herein by reference.

60. The Department of Health and Human Services is required by law and in particular by 5 U.S.C. § 552, 5 U.S.C. § 706(2)(D) and 42 U.S.C. § 1395hh to publish proposed

rules in the Federal Register prior to their promulgation. All interested persons must be given an opportunity to participate in the rulemaking process.

61. The Department of Health and Human Services is further bound by its own Statement of Policy, issued January 28, 1971, in which the Secretary stated that "[e]ffective immediately, all agencies and offices of the Department which issues rules and regulations relating to public property, loans, grants, benefits, or contracts are directed to utilize the public participation procedures of the APA, 5 U.S.C. 553." 36 Fed. Reg. 2532 (February 5, 1971).

62. Plaintiffs Ringer, Holmes, Webster-Zieber, Vescio, Winter and the class which they represent are entitled to Medicare inpatient hospital insurance benefits for hospital services which are "reasonable and necessary for the treatment of illness or injury..." pursuant to the Medicare Act, 42 U.S.C. § 1395y(a)(1), and the corresponding regulation, 42 C.F.R. § 405.310(k).

63. The Coverage Issues Appendices to the "Medicare Carriers Manual" the "Medicare Intermediary Manual" and the HCFA BCBR Ruling which provide that BCBR surgery is never a reasonable and necessary treatment of obstructive pulmonary conditions were issued without valid, legal, or proper notice of proposed rulemaking.

64. By denying benefits for BCBR surgery, the Appendices to the Manuals described above and the HCFA BCBR Ruling substantively changed the Medicare benefits policy stated in 42 U.S.C. § 1395y(a)(1) and 42 C.F.R. § 405.310(k) which require benefits for services which are "reasonable and necessary" to treat an illness or condition.

65. These Appendices and the HCFA BCBR Ruling precluding Medicare coverage of BCBR directly, substantially and definitively control the scope and extent of Medicare benefits available to plaintiffs and to the class which they represent.

66. As a result of defendant's failure to issue the policy precluding Medicare coverage of BCBR pursuant to the rulemaking procedures specified by the Administrative Procedure Act, the requirements of 5 U.S.C. § 553(b), 5 U.S.C. § 706(2)(D) and 42 U.S.C. § 1395hh have been vio-

lated, and the exclusion from coverage of BCBR surgery contained in the Appendices is accordingly null and void and of no effect.

COUNT ELEVEN.

67. Paragraphs 1-66 are incorporated herein by reference.

68. Hearings before administrative law judges on Part A claims requested by or on behalf of Medicare beneficiaries who have received BCBR have been held before at least ten different administrative law judges in various areas of the country.

69. As a matter of both HHS policy and practice all claims for hearings regarding Medicare benefits are assigned upon request of the beneficiary or his representative to an administrative law judge sitting at a location designated by the beneficiary as convenient and accessible.

70. Upon request, plaintiff Winter acts as the representative of his BCBR patients in administrative hearings. In all cases where he is designated as the representative of a Medicare patient for purposes of representation in the administrative hearing process, plaintiff Winter has designated West Los Angeles as an acceptable and convenient site for all administrative hearings pertaining to BCBR.

71. Until approximately April, 1980, defendant, consistent with her policy and practice, honored all such requests regarding assignment of claims for BCBR coverage for administrative hearings. Hearings requested by or on behalf of Medicare beneficiaries who have received BCBR from plaintiff Winter and who reside in the Los Angeles area were uniformly assigned to and held before the same administrative law judge, Judge Edward H. Schiff.

72. Judge Schiff, like all other ALJ's reviewing claims for Medicare payment for BCBR, has ruled that such surgery is reasonable and necessary in every case which he has decided to date.

73. Sometime prior to June 18, 1980, plaintiff Winter was informed by staff personnel of the Medicare Regional Office in San Francisco that henceforward claims would not be assigned to Judge Schiff for hearings.

74. On June 18, 1980 Administrative Law Judge Stanley Sadur confirmed the information previously provided to plaintiff Winter that BCBR hearings would no longer be assigned to Judge Schiff.

75. On June 18, 1980 Judge Sadur requested time to discuss the matter with unidentified superiors at the Health Care Financing Administration's ("HCFA") offices in Washington, D.C.

76. On June 23, 1980, Judge Sadur informed plaintiff Winter that it would be necessary for Judge Schiff to be relieved of further hearings involving BCBR claims.

77. Defendant's actions in directing that no more BCBR hearings be assigned to Judge Schiff constitutes an unwarranted and unlawful intrusion upon the integrity and quasi-adjudicative and deliberative functions of the Bureau of Hearings and Appeals and denies plaintiffs due process of law in violation of Social Security Act, 42 U.S.C. § 205(a) and (b), the Administrative Procedure Act, 5 U.S.C. § 706, and the due process clause of the Fifth Amendment to the United States Constitution.

COUNT TWELVE.

78. Paragraphs 1 through 77 are incorporated herein by reference.

79. The HCFA BCBR Ruling neither adds to nor detracts from defendant's previous policy denying Medicare coverage for BCBR surgery under all circumstances or the application of that policy to individual cases, both as set out above. In particular, the policy statement merely reaffirms instructions already generally applicable to fiscal intermediaries set out in the Coverage Issues Appendices (*see* ¶¶ 14, 15 *supra*, and Defendant's letter (with attachments) attached as Exhibit B), as applied to each claim for reimbursement for expenses associated with BCBR surgery.

80. The HCFA BCBR Ruling is based on a legal and factual record already rejected in every one of approximately 170 decisions of the Administrative Law Judges and the Appeals Council, and as such is arbitrary, capricious, contrary to law and beyond defendant's statutory authority in

violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

81. The HCFA BCBR Ruling arbitrarily and illegally discriminates against Medicare beneficiaries desiring to obtain BCBR treatment and be reimbursed therefor by the Medicare Program, and accordingly denies plaintiffs and the members of the class they represent equal protection of the laws in violation of the Fifth Amendment of the United States Constitution.

82. The HCFA BCBR Ruling is illegal, arbitrary, capricious, irrational and deprives plaintiffs of due process of law in violation of the Fifth Amendment to the United States Constitution.

83. The HCFA BCBR Ruling violates the following provisions of the Medicare Act:

(a) 42 U.S.C. § 405(a), which requires defendant to adopt reasonable rules to establish the right to benefits under the Medicare Program;

(b) 42 U.S.C. § 1395y(a)(1), which requires that defendant pay insurance benefits for hospital services for the treatment of illness or injury;

(c) 42 U.S.C. § 1395, which prohibits defendant from "exercis[ing] . . . supervision or control over the practice of medicine or the manner in which medical services are provided . . ."

As a result of these violations, the HCFA BCBR Ruling is null and void.

84. The HCFA BCBR Ruling unconstitutionally interferes with the practice of medicine and the patient-physician relationship in violation of the First, Fourth, Fifth and Ninth Amendments to the United States Constitution.

COUNT THIRTEEN.

85. Paragraphs 1 through 84 are incorporated herein by reference.

86. The HCFA BCBR Ruling invades the personal liberty interests of plaintiffs and the class they represent by denying them due process of law and equal protection of the laws in violation of the Fifth Amendment to the United

States Constitution and by interfering with the practice of medicine and the patient-physician relationship in violation of the First, Fourth, Fifth and Ninth Amendments to the United States Constitution.

87. As a consequence of the foregoing deprivation of rights secured by the United States Constitution, plaintiffs have suffered material damage to their health, well being and property.

COUNT FOURTEEN.

88. Paragraphs 1 through 87 are incorporated herein by reference.

89. Defendant's promulgation of the HCFA BCBR Ruling after the filing of the Complaint in this matter is a thinly disguised effort to divest this Court of jurisdiction over this matter by attempting to erect an additional administrative barrier to be surmounted by those plaintiffs, and the class they represent, who have not yet undergone the BCBR surgery. This type of bootstrap argument is a fundamental interference with the orderly administration of due process of law in violation of the Fifth Amendment to the United States Constitution.

90. As a consequence of the foregoing deprivation of rights secured by the United States Constitution, plaintiffs have suffered material damage to their health, well being and property.

PRAYER.

WHEREFORE, plaintiffs pray that this Court:

1. Determine that this action is maintainable as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure;

2. Declare that defendant has violated the Medicare Act, 42 U.S.C. § 1395d(a)(1) and § 1395y(a)(1), by denying Medicare benefits for hospital costs incurred in providing BCBR surgery on the grounds that such surgery is "not reasonable and necessary" and enjoin defendants, preliminarily and permanently, from future violations;

3. Declare that defendant's Coverage Issues Appendices to the Medicare Carriers Manual and the Medicare Intermediary Manual and the HCFA BCBR Ruling, insofar as

those documents state that BCBR surgery is never a reasonable and necessary treatment for obstructive pulmonary conditions, are in violation of the Medicare Act, 42 U.S.C. § 1395, § 1395d(a)(1) and § 1395y(a)(1) and are therefore null and void and of no effect:

4. Declare that the Appendices and Ruling described in paragraph 3 above were issued without public notice or public participation, in violation of 5 U.S.C. § 553, 5 U.S.C. § 706 and 42 U.S.C. § 1395hh and are therefore null and void and of no effect;

5. Issue an injunction compelling defendant to amend said Coverage Issues Appendices and Ruling forthwith to provide BCBR is a reasonable and necessary treatment for obstructive pulmonary conditions;

6. Declare that defendant's actions described herein constitute an "unreasonable administrative delay" and "unreasonably withheld administrative action" in violation of the Administrative Procedure Act, 5 U.S.C. § 555(b) and § 706(1), and enjoin defendants, preliminarily and permanently, from future violations;

7. Declare that defendant's refusal to recognize BCBR surgery as a "reasonable and necessary" treatment for obstructive pulmonary conditions is arbitrary, capricious and beyond her statutory authority in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(a), and enjoin defendant, preliminarily and permanently, from future violations;

8. Declare that defendant's actions described herein have denied plaintiffs their statutory rights under the Medicare Act without due process of law in violation of the Fifth Amendment to the United States Constitution and enjoin defendant, preliminarily and permanently, from future violations;

9. Declare that defendant's actions described herein deprive plaintiffs of equal protection of the laws in violation of the due process clause of the Fifth Amendment and enjoin defendant, preliminarily and permanently, from future violations.

10. Declare that defendant's actions described herein constitute an unlawful interference with the plaintiff

Winter's practice of medicine and plaintiff patients' relationship with plaintiff Winter in violation of the Medicare Act, 42 U.S.C. § 1395, and enjoin the defendant, preliminarily and permanently, from future violations;

11. Declare that defendant's actions unconstitutionally and unlawfully interfere with the practice of medicine and the patient-physician relationship in violation of the First, Fourth, Fifth and Ninth Amendments and enjoin defendant, preliminarily and permanently, from future violations;

12. Declare that defendant's actions described herein threaten an imminent and irreparable deprivation of plaintiffs' lives in violation of their statutory rights and the due process clause of the Fifth Amendment and enjoin defendant, preliminarily and permanently, from future violations;

13. Declare the defendant's actions described in Count Eleven constitute an illegal and unwarranted intrusion into the quasi-adjudicative deliberative processes of the administrative law judge thereby depriving plaintiffs of statutory and constitutional rights to a fundamentally fair hearing and enjoin defendant, preliminarily and permanently, from future violations.

14. Declare that the HCFA BCBR Ruling described in Count Twelve is arbitrary, capricious, contrary to law and beyond defendant's statutory authority in violation of the Medicare Act and the Administrative Procedure Act; that it violates 42 U.S.C. §§ 405(a), 1395 and 1395y(a)(1), and that it violates plaintiffs' rights secured by the First, Fourth, Fifth and Ninth Amendments to the United States Constitution;

15. Issue an injunction prohibiting defendant from implementing or applying the policy expressed in the HCFA BCBR Ruling;

16. Award plaintiffs damages in an amount to be determined by the proofs for the violation of their rights secured by the First, Fourth, Fifth and Ninth Amendments to the United States Constitution as set forth in Counts 13 and 14;

17. Award plaintiffs costs, including reasonable attorneys' fees; and

18. Grant such further relief as the Court may deem reasonable and appropriate.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 80-04132-MRP (Gx)

FREEMAN H. RINGER, ET AL., PLAINTIFFS

v.

MARGARET HECKLER, DEFENDANT.

STIPULATION.

During the hearing in this case on October 27, 1980 the paties entered into a Stipulation with respect to certain matters. The Stipulation was in written form, according to the transcript, and was modified by the parties through interlineation in open Court. The transcript indicates that a copy of the Stipulation was submitted to the Court for filing, but the clerk has been unable to locate the original document.

The parties have conferred and agreed, however, that the attached Stipulation, including the interlineations noted with respect to paragraph 6, represents the Stipulation agreed to by the parties and filed with the Court on October 27, 1980. Accordingly, submitted herewith for filing is a copy of the October 27, 1980 Stipulation. Filing of the Stipulation at this time is necessary because counsel for the plaintiffs has relied on the matters contained therein in the course of responding to the government's Petition for a Writ of Certiorari.

Respectfully submitted,

/s/ Malcolm J. Harkins

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IN THE UNITED STATES DISTRICT COURT
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Civil Action No. 80-04132-MRP (Gx)

FREEMAN H. RINGER, ET AL., PLAINTIFFS,

v.

PATRICIA ROBERTS HARRIS, DEFENDANT.

STIPULATION.

The parties hereby stipulate to the following:

1. Were plaintiffs Ringer, Vescio, Webster-Zieber and Holmes to testify, each would testify to essentially the following:

(a) Each is a patient of Dr. Benjamin Winter;

(b) Each has been diagnosed as suffering from severe lung disease;

(c) Each has experienced severe breathing difficulties as a symptom of his or her illness;

(d) Dr. Winter has prescribed bilateral carotid body resection (BCBR) surgery to alleviate the symptoms of their lung diseases; and

(e) Each is a Medicare beneficiary eligible for benefits under Medicare Part A and Part B.

2. Plaintiffs Holmes, Webster-Zieber and Vescio would testify that each had prescribed and successfully underwent BCBR surgery to alleviate the symptoms of their illnesses and that they believe that the surgery did in fact alleviate those symptoms.

3. Plaintiff Ringer would testify that he has had prescribed and desires to undergo BCBR surgery but is unable to pay the costs thereof.

4. Neither Mr. Ringer nor the class members he represents have filed claims for Medicare reimbursement for BCBR surgery costs.

5. The Department of Health and Human Services has ruled that "Bilateral carotid body resection performed to relieve and treat pulmonary symptoms and diseases is not established as safe and effective and, therefore, is excluded from Medicare coverage under the authority of section 1862(a)(1) of the Act."

6. As of October 27, 1980, at least 199 appeals of denials of Medicare reimbursement for costs of BCBR surgery had been heard by HHS administrative law judges. Of these 199 appeals, the ALJs ordered reimbursement in at least 170 cases and at least 12 cases were dismissed as premature. Decisions ordering reimbursement have been rendered by at least ten different ALJs in addition to the three judges of the Appeals Council.

7. The Certified Administrative Record, including the transcript and administrative record, will be in the case

Lena Furguson, Appeals Council Dec. 126-12-3830, filed by defendant with the Court herewith, or as soon as a copy is available. If a certified copy is not available and filed with the Court on or before the hearing date, either party may file an uncertified copy of the Appeals Council Decision and the transcript and exhibits upon which such Decision was based subject to replacement with the Certified Record when available.

Respectfully submitted,

/s/ Joseph L. Bianculli

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In the Supreme Court of the United States

No. 81-1772

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER,

v.

FREEMAN H. RINGER, ET AL.

ORDER ALLOWING CERTIORARI. Filed June 27, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

Office-Supreme Court, U.S.
FILED
MAY 27 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1772

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

FREEMAN H. RINGER, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1982

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,

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FREEMAN H. RINGER, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Although petitioner's statement that this case concerns the jurisdiction of a federal district court is technically correct, that assertion—like most of the argument in support of the Petition for a Writ of Certiorari—is deceptively sterile. Notwithstanding petitioner's effort to downplay the factual background of respondents' complaint, this case involves an unusual instance of an administrative agency at war with itself. Indeed, respondents are aware of only two reported cases in which plaintiffs have alleged factually similar substantive claims. In both cases—only one of which arose under the Social Security Act—the Courts of Appeals agreed with the Ninth Circuit's ruling here and found jurisdiction to review claims that federal administrative agencies illegally were requiring private parties to relitigate repeatedly issues which the agencies consistently lost before their own administrative law judges.

Respondents' principal complaint is that petitioner, the Secretary of Health and Human Services (the "Secretary"), requires persons seeking medicare reimbursement for a surgical procedure known as bilateral carotid body resection ("BCBR") to relitigate repeatedly the safety and efficacy of the procedure. The Secretary insists on duplicative and costly relitigation despite the fact that at least ten different administrative law judges ("ALJs"), sitting in some twenty-five consolidated cases, and the Appeals Council, the highest quasi-adjudicative body within the Department of Health and Human Services, have ruled in 170 individual appeals that BCBR is safe and effective, that the procedure is reasonable and necessary treatment for chronic obstructive pulmonary disease ("COPD") and, accordingly, that the medicare program must pay the costs of BCBR. The Secretary demands further administrative litigation despite her insistence that publication of "a formal administrative ruling, binding upon ALJs and the Appeals Council," absolutely prohibits medicare payment for BCBR performed to relieve symptoms of pulmonary distress. Petition for a Writ of Certiorari ("Petition") at 6. Thus, the Secretary requires the elderly and disabled beneficiaries of the medicare program to relitigate in hearings, which she admits they can no longer win, issues which she has lost repeatedly.

In a similar case where the Secretary reaffirmed a disputed policy rejected only four times by the ALJs and the Appeals Council, the Second Circuit aptly stated the jurisdictional question here:

> We thus face the rather novel question of whether judicial relief is available where all eligible . . . claimants . . . are required to exhaust their administrative remedies on an individual basis in order to receive benefits which the SSA's own Appeals Council has consistently ruled must be given them. The issue is whether a federal court is powerless to prevent the Secretary from insisting upon the sterile gesture of individual exhaustion when the result appears to be a foregone conclusion.

Jones v. Califano, 576 F.2d 12, 17 (2nd Cir. 1978). Although the petitioner chooses to ignore the unusual factual setting of this case, the jurisdictional issues cannot be addressed without an accurate and complete understanding of the circumstances in which this case arose.[1]

Bilateral carotid body resection is a surgical procedure developed in the early 1960's for relief of the symptoms of severe chronic obstructive pulmonary disease (*e.g.,* chronic bronchitis, emphysema, asthma).[2] From the mid 1970's to the present the Secretary has taken the position that BCBR is never "reasonable and necessary" treatment and has refused to pay medicare benefits for BCBR unless ordered to do so by an ALJ. The Secretary contends that BCBR has not been proven "safe

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[1] Petitioner's description of the medicare program is adequate and will not be repeated.

[2] The carotid bodies are structures the size of a rice grain located on each side of the neck which are involved in a reflex system which controls the diameter of the bronchical tubes. Under normal conditions, when the carotid body senses a significantly reduced blood oxygen level, nerve impulses are generated, triggering a reflex system which rapidly increases ventilation, reducing the level of carbon dioxide in the blood. Thereafter, ventilation is reduced and the respiratory system is returned to a normal, steady rate. In people who have COPD, the reflex system is hyperreactive and triggers at a much lower threshold than it does in normal individuals, producing a severe bronchospasm, sometimes evident clinically as an asthmatic attack, chronic bronchitis (coughing), or emphysema (*i.e.,* shortness of breath). Considerable evidence developed through use of the Winter technique of BCBR seems to indicate that removal of the carotid bodies immediately changes (*i.e.,* elevates) the threshold at which the reflex system triggers, relieving the bronchospasm of COPD patients and opening the bronchial passages. After BCBR, the patient will experience fewer or no reflex responses unless there is an overwhelming stimulus. BCBR surgery does not cure COPD. However, the change effected by BCBR may be sufficient to preclude further symptoms for the remainder of the patient's life, thereby allowing the patient to lead a more independent and normal life. Further, because the debilitating symptoms of COPD largely are eliminated by BCBR, patients require fewer doctor visits and the need for repeated hospitalization—all reimbursed by medicare—is likewise often eliminated. *See generally In re Ferguson,* No. 126-12-3830 (HHS Appeals Council, October 18, 1979).

and efficacious" and that the treatment is not accepted generally by the medical community. Significantly, the Secretary's position is based upon an alleged lack of data and *not* upon data or proof that BCBR is unsafe or ineffective.

Despite the Secretary's prohibition on payment for BCBR, many patients have undergone the surgery. The Secretary uniformly denies reimbursement, and medicare beneficiaries regularly challenge the denial in administrative hearings. In *every one* of the 170 claims decided prior to the filing of this lawsuit, BCBR was found to be reasonable and necessary and the medicare program was ordered to pay the cost of the surgery. The 170 claims were decided in approximately twenty-five separate cases by at least ten different ALJs.

Following rejection of the "no payment" policy in the first 70 appeals, the Secretary appealed the decisions as a group to the HHS Appeals Council, a panel of administrative law judges and the highest administrative hearing body with jurisdiction to review the cases.[3] After three days devoted almost exclusively to expert medical testimony, the Appeals Council ruled that the cost of BCBR must be paid by the medicare program. *In re Ferguson,* No. 126-12-3830 (HHS Appeals Council, October 18, 1979). A parade of witnesses testified before the Appeals Council that BCBR was effective in relieving the symptoms of COPD. After comparing mortality figures for BCBR patients against similar figures for patients treated conventionally (usually medicinally), the Appeals Council held that BCBR posed "no unacceptable risk," ruled that BCBR was reasonable and

[3] Technically, only one case was before the Appeals Council, but the decision governs all 70 cases decided by ALJs to that point. Similar procedures were followed by ALJs. Thus, while there are no regulations specifically providing for class actions before ALJs, individual claims were typically consolidated for hearing and decision. Consolidation was possible because the single issue in each hearing was the validity of the Secretary's policy forbidding payment. The Appeals Council, for example, refused to hear testimony from individual patients because, based on the records below, it assumed that all claimants would testify favorably. *In re Ferguson,* No. 126-12-3830 at 3 (HHS Appeals Council, October 18, 1979). Instead, the Appeals Council limited review to the questions posed by the Secretary regarding the validity of the medical evidence supporting the Secretary's policy.

necessary treatment and ordered that medicare reimburse the costs of the treatment. *See In re Ferguson,* No. 126-12-3830 at 22 (HHS Appeals Council, October 18, 1979).

Respondents' initial complaint, which was filed in September, 1980, alleged several related bases for relief. Respondents' principal claim, as the Court of Appeals recognized, was that the Secretary's claims review procedures were unconstitutional and illegal insofar as claimants were required to relitigate repeatedly issues which the Secretary has lost time after time. Respondents' claims in the latter regard were based chiefly upon the due process clause of the United States Constitution and upon 42 U.S.C. § 405(h). In addition, respondents claimed that adherence to procedures requiring claimants to relitigate repeatedly a single issue which, prior to filing of this action, always was resolved adversely to the Secretary was arbitrary and capricious action in violation of the Administrative Procedure Act ("APA") and the Social Security Act. Finally, respondents claimed that the Secretary's payment prohibition was void because it had not been promulgated in accordance with the rulemaking requirements of the APA or the Social Security Act.

Respondents sought declaratory and injunctive relief precluding the Secretary from continuing to adhere to illegal claims review procedures, particularly insofar as such procedures required claimants to undergo essentially duplicative and meaningless hearings. Respondents did not seek a determination of eligibility for medicare benefits and did not request that the Court order payment of benefits.[4] In fact, respondents recognized that the District Court would not award benefits and continued to pursue their benefit claims through the, albeit illegal, administrative procedures established by the Secretary.

In October, 1980, one month after suit was filed in this case, petitioner published a formal Health Care Financing Administration ("HCFA") Ruling prohibiting Medicare payment for BCBR in any circumstances. 45 *Fed. Reg.* 71426

[4] The Court of Appeals nonetheless held that respondents' secondary claims were claims for benefits under the Medicare Act. *Ringer v. Schweiker,* 697 F.2d 1291, 1294 (9th Cir. 1982).

(October 28, 1980). The Ruling was predicated on "a lack of clinical data, *i.e.*, controlled studies to find that the procedure is safe and effective," precisely the issue resolved adversely to the Secretary by the ALJs and by the Appeals Council. *Id.* Since the promulgation of the BCBR Ruling, one ALJ has refused to order payment for BCBR.[5]

The Secretary has stated over and over again that "[b]y reason of the Secretary's ruling published in the *Federal Register,* the administrative law judges and the appeals council are required to follow the Secretary's ruling precluding coverage for BCBR" (D. Brief at 28 n.11), and that, due to the Ruling, "no beneficiaries will be reimbursed for BCBR." *Id.* at 20. In addition, in the District Court the Secretary stipulated that:

> The Department of Health and Human Services has ruled that "Bilateral carotid body resection performed to relieve and treat pulmonary symptoms and diseases is not established as safe and effective and, therefore, is excluded from Medicare coverage under the authority of Section 1862(a)(1) of the Act."

In this Court, petitioner again asserts that the Ruling binds both the ALJs and the Appeals Council to deny all claims for BCBR:

> [I]n October, 1980, HCFA issued a formal administrative ruling, binding upon ALJs and the Appeals

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[5] Respondents submitted a copy of the decision in this case to the Ninth Circuit Court of Appeals. The decision involved surgeries performed both before and after the BCBR Ruling. Reimbursement was denied in all cases, but reimbursement was denied for treatment performed after publication of the Ruling solely on the basis of the Ruling. Petition at 20 n.15.

This single adverse decision illustrates one of the practical inequities of the Secretary's position. For example, where, as here, the Agency loses all but a single case before the ALJs, and judicial review of the single adverse decision is sought, the Secretary likely will be afforded the substantial advantage of arguing on appeal that the single decision favorable to the Agency must be accorded deference and affirmed under the substantial evidence test despite the fact that the ALJs, on full consideration of the merits, regularly reject the Agency's position.

> Council, that prohibits payments under Medicare for BCBR performed to relieve symptoms of pulmonary distress.

Petition at 6. All claims presented to an ALJ for BCBR performed after October 1, 1980, have been denied based solely upon the Ruling.

Finally, the human significance of the Secretary's demand for further administrative litigation should not be lost in the technical legal arguments. Since this action was filed two of the original named plaintiffs have died. One of the plaintiffs, Ernie M. Haley, died while awaiting BCBR. In addition, contrary to the Secretary's assertion, Petition at 20, respondent Jean Vescio had not had BCBR at the time the case was filed. However, after filing of the original complaint, Ms. Vescio's physical condition deteriorated to the point that BCBR could not be delayed irrespective of the Secretary's payment prohibition. Hospital and surgical services were arranged for Ms. Vescio on an emergency basis without any assurance of payment, and on October 11, 1980, Ms. Vescio underwent BCBR and thereafter filed a claim for payment. The Secretary does not even mention the impact of the policy on those beneficiaries, who unlike Ms. Vescio, are unable to obtain emergency care without charge and are therefore left to suffer or, perhaps, to die. Similarly, the Secretary cavalierly dismisses in a footnote the question of how claimants, such as respondent Ringer, who are unable to pay for the surgery themselves, file a claim for reimbursement and then litigate the claim administratively, ever could challenge the Secretary's policy.[6]

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[6] While Mr. Ringer did not file a formal claim for payment of Medicare benefits, he did informally request that reimbursement be made available for his surgery. Mr. Ringer was advised that no information could be provided unless he underwent treatment and filed a claim for reimbursement. Ms. Vescio also sought to determine coverage prior to obtaining BCBR. Ms. Vescio was advised that BCBR was excluded from coverage and would not be covered. Under *Mathews v. Eldridge*, 424 U.S. 319 (1976) the filing of such a request constitutes the filing of a claim under 42 U.S.C. § 405. *See* 424 U.S. at 329.

REASONS WHY THE WRIT SHOULD BE DENIED.

I. Summary of Argument.

Even if one accepts petitioner's erroneous assumption that this case is an action to recover medicare benefits subject to the jurisdictional bar of 42 U.S.C. § 405(h), petitioner's claim that the Court of Appeals ruling cannot be reconciled with *Weinberger v. Salfi*, 422 U.S. 749 (1975) and *Mathews v. Eldridge*, 424 U.S. 319 (1976) is plainly and demonstrably wrong. Not only is this case consistent with the holdings in *Salfi* and *Eldridge*, but petitioner's admission that the BCBR Ruling absolutely prohibits the ALJs and the Appeals Council from awarding reimbursement for BCBR places this case within the rule of *Mathews v. Diaz*, 426 U.S. 67 (1976). As in *Diaz*, petitioner's repeated acknowledgment that no BCBR claims can be allowed under the Ruling is "tantamount to a decision denying the application and . . . a waiver of the exhaustion requirements." 426 U.S. at 73, 77. Further, the ruling of the Court of Appeals is consistent with decisions of this Court and other courts recognizing that a challenge to the legality of an administrative review process is distinct from a challenge to the merits of an agency decision and therefore is exempt from any otherwise applicable exhaustion requirements.

Second, because jurisdiction is available under 42 U.S.C. § 405(g) there is no need to determine whether jurisdiction is also available under the mandamus statute, 28 U.S.C. § 1361. Nonetheless, the Court of Appeals ruling that mandamus jurisdiction is available for respondents' procedural claims is both correct and consistent with numerous other cases addressing the question. Moreover, there is no question that this case is appropriate for the exercise of mandamus jurisdiction. Respondents have alleged that the Secretary subjects claimants to unlawful administrative review processes in violation of specific obligations imposed by 42 U.S.C. § 405(h) and by the due process clause of the United States Constitution. The decisions of this Court and of the Courts of Appeals in related contexts have held that the federal courts have mandamus jurisdiction under 28 U.S.C. § 1361 to order the Secretary to conform to the requirements imposed by law.

Similarly, because there is jurisdiction under 42 U.S.C. § 405(g) to hear this case whether respondents' claims are characterized as "procedural" or as claims for benefits, it is unnecessary to consider other potential bases for jurisdiction. However, it is also apparent that, as the Court of Appeals held, respondents' principal claims are in fact purely procedural and this is not an action "to recover on any claim" arising under the Medicare Act. 42 U.S.C. § 405(h). Consequently, federal question jurisdiction over respondents' complaint is not intercepted by 42 U.S.C. § 405 as interpreted and applied in *Salfi* and *Eldridge*.

Finally, issuance of a writ of certiorari is particularly inappropriate due to the virtually unique factual circumstances of this case. Indeed, this case arose solely because the Department of Health and Human Services persists in adhering to schizophrenic benefit review procedures in which all BCBR claims are denied initially notwithstanding regular rulings by the Department's own ALJs that BCBR is reasonable and necessary treatment and, therefore, reimbursable under the medicare program. Petitioner's timeworn argument that the Court of Appeals decision will open the floodgates to premature litigation is wrong. In more than forty years since passage of the Social Security Act there has been only one other reported decision in which a court has asserted jurisdiction due to the Secretary's failure to conform to the rulings of the ALJs and the Appeals Council.

II. The Decision Of The Court Of Appeals Finding Jurisdiction Under 42 U.S.C. § 405(g) Is Consistent With *Weinberger v. Salfi* And Its Progeny.

Petitioner's principal argument for review is that the Court of Appeals misread the jurisdictional limitations imposed by 42 U.S.C. §§ 405(g) and (h) and ruled inconsistently with the decisions of this Court in *Weinberger v. Salfi*, 422 U.S. 749 (1975) and *Mathews v. Eldridge*, 424 U.S. 319 (1976). Petitioner claims that the Court of Appeals decision circumvents the jurisdictional limitations of 42 U.S.C. § 405(h) by authorizing judicial review before respondents have exhausted their administrative remedies. Petition at 16-24.

Petitioner has misread both *Salfi* and *Eldridge*. Further, petitioner completely ignores the factual background of the present case and the controlling impact of this Court's decision in *Mathews v. Diaz*, 426 U.S. 67 (1976).

In *Mathews v. Eldridge*, 424 U.S. 319 (1976) this Court explained that *Salfi* interpreted Section 405(g) to establish two prerequisites—one waivable, one nonwaivable—to the exercise of jurisdiction over a claim for medicare benefits. 424 U.S. at 328. The nonwaivable component of Section 405(g) jurisdiction is the requirement that a claim be presented to the Secretary. *Id.* The requirement that the administrative remedies be completely exhausted may be waived by either the Secretary or by the court. *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 72-73, 76-77 (1976).

Petitioner acknowledges that at least some of the named respondents have satisfied the non-waivable requirement by filing the required claim with the Secretary. Petition at 20. However, the Secretary argues that complete exhaustion cannot be waived because she "moved to dismiss the action under 42 U.S.C. § 405(g) on the ground that respondents had not exhausted their administrative remedies thereby refuting any suggestions that he [sic] had determined that the denial of coverage for BCBR prior to an ALJ hearing or Appeals Council review was a sufficiently 'final decision' for purposes of judicial review." Petition at 18.

Paradoxically, the Secretary contemporaneously argues that the BCBR Ruling is "binding upon ALJs and the Appeals Council" and henceforth will prohibit any Medicare payment for BCBR. Petition at 6. The Secretary's statement before this Court merely confirms identical assertions and stipulations made in the District Court and the Court of Appeals. *See* supra at 6-7. Further, as both petitioner and the Court of Appeals recognize, all BCBR claims for treatment rendered after issuance of the BCBR Ruling have been denied "on that basis alone." Petition at 20 n.15. *See also Ringer v. Schweiker*, 697 F.2d 1291, 1293 (9th Cir. 1982).

The Secretary's repeated assertions that the ALJs and the Appeals Council are bound by the BCBR Ruling and that BCBR claims cannot be allowed under any circumstances,

bring this case within the doctrine of *Mathews v. Diaz*, 426 U.S. 67 (1976) and obviate any need for further exhaustion of administrative remedies. In *Diaz* this Court noted that Section 405(g) jurisdiction was available to hear and decide the benefit claims of a plaintiff who had not exhausted the prescribed administrative process because "in colloquy with the [District] court [the Secretary] acknowledged that [plaintiff] had filed an application which could not be allowed under the statute." *Id.* at 73 (footnote omitted). This Court also held that jurisdiction also was available to decide the claim of second plaintiff because the Secretary had stipulated in the District Court—and reaffirmed in briefs before this Court—that the application would not be allowed. This Court ruled: "For jurisdictional purposes, we treat the stipulation in the District Court as tantamount to a decision denying the application and as a waiver of the exhaustion requirements." *Id.* at 76-77.

In this case there is much more than a concession in colloquy between counsel and the District Court. Here, the Secretary stipulated that all BCBR claims are "excluded from Medicare coverage." Supra at 6. Moreover, the Secretary formalized her position after the initiation of this litigation by publishing it in the *Federal Register* as a Health Care Financing Administration Ruling in order to insure that ALJs and the Appeals Council would deny benefits for BCBR. The Secretary even now insists in this Court, as she did before the District Court and the Court of Appeals, that the Ruling absolutely binds the Administrative Law Judges and the Appeals Council to uncritical acceptance of the absolute ban on BCBR coverage. Petition at 6. As in *Diaz*, the Secretary's repeated concessions that all BCBR claims will be denied is tantamount to a final decision and a waiver of further administrative exhaustion.

Petitioner's statement that the Court of Appeals "pointed to nothing to suggest that the Secretary, by issuing the ruling had waived the requirement of full exhaustion of administrative remedies," Petition at 19, ignores the factual basis of the Court of Appeals decision. The Secretary has admitted over and over again the accuracy of the Court of Appeals conclusion that "the Secretary's ruling makes the results of that [administrative hearing] process both pre-ordained and immutable," 697 F.2d

at 1295, and, therefore, both "futile" and "worthless to the Agency as well as the claimant." *Id.* The Secretary's own statements during the course of this litigation bring this case within the principles of *Salfi* and *Diaz*. In this case "further exhaustion would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by any administrative or judicial interest." *Ringer v. Schweiker*, 697 F.2d 1291, 1295 (9th Cir. 1982), *quoting, Weinberger v. Salfi*, 422 U.S. 749, 765-66 (1975).

Petitioner also erroneously suggests that respondents have presented "no colorable claim that an erroneous denial of benefits for the BCBR procedure at an early stage in the administrative proceedings will injure them in a way that cannot adequately be remedied if they are subsequently awarded benefits." Petition at 23. Petitioner's argument ignores the nature of the injury which respondents allege and, therefore, the basis of the Court of Appeals ruling.

In *Mathews v. Eldridge*, 424 U.S. 319 (1975) this Court cautioned that "[t]he core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered remains applicable." 424 U.S. at 331 n.11. The essence of respondents' principal claims is that the Secretary's insistence upon duplicative litigation violates 42 U.S.C. § 405(h) and denies due process of law. Thus, respondents' principal claims rest on the proposition that exhaustion of the administrative remedy causes the unlawful injury. *Mathews v. Eldridge*, 424 U.S. 319, 331 (1976). If respondents are forced to litigate their claims before the Agency prior to seeking judicial determination that the relitigation policy is unlawful, the injury will be complete and irremediable.

The Court of Appeals ruling that further administrative exhaustion "would fail to vindicate all the interests pressed by claimants even if the claimants won the appeal," 684 F.2d at 647, is consistent not only with *Eldridge* but with numerous decisions of this Court and of the lower courts holding that exhaustion of administrative remedies is not required where

"the plaintiff contends that the administrative system is unlawful or unconstitutional in form or application." [7] *Patsy v. Florida International University,* 634 F.2d 900, 904 (5th Cir. 1981), *reversed on other grounds,* ____ U.S. ____, 102 S. Ct. 2,557 (1982). *See also Barry v. Barchi,* 443 U.S. 55, 63 n. 10 (1979), *quoting, Gibson v. Berryhill,* 411 U.S. 564 (1973); *Ostereich v. Selective Service System,* 393 U.S. 223, 241-42 (1968) (Harlan, J., concurring); *Leedom v. Kyne,* 358 U.S. 184, 188 (1958); *Himmler v. Califano,* 611 F.2d 137, 148 (6th Cir. 1979); *Continental Can Co. v. Marshall,* 603 F.2d 590, 597 (7th Cir. 1979); *Caswell v. Califano,* 583 F.2d 9, 13-15 (1st Cir. 1978); *Blankenship v. Secretary of HEW,* 587 F.2d 329, 332 (6th Cir. 1978); *Wright v. Califano,* 587 F.2d 345, 349 (7th Cir. 1978).[8]

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[7] Petitioner refers to some BCBR claimants' request that the Appeals Council stay administrative proceeding relating to BCBR pending the outcome of this case as an example of respondents' supposed efforts to avoid exhaustion of administrative remedies. Petitioner's argument is misleading. Respondents allege that having to submit to the unlawful review process causes their injury. Petitioner's argument, if successful, would foreclose any meaningful remedy from respondents and other similarly situated claimants even if their claim that the Secretary's review process is unlawful is correct. The request for stay of the administrative proceedings was predicated on respondents' belief that those proceedings are unlawful. The request merely was an effort to preserve the court's ability to award effective relief.

[8] This Court elsewhere has rejected the Secretary's suggestion that further proceedings should be required because they might lead to reconsideration of the Ruling:

> It is unrealistic to expect that the Secretary would consider substantial changes, in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context.

Mathews v. Eldridge, 424 U.S. 319, 330 (1976). Furthermore, the history of this case counsels against giving credence to the Secretary's claim. If adverse decisions from ten separate ALJs sitting in twenty five consolidated cases and the Appeals Council do not cause the Secretary to reconsider or revise her Ruling, the suggestion that an additional administrative appeal would prompt such action is incredible. In fact, the Ruling issued in response to this litigation absolutely denies BCBR coverage based upon the very same 1978 government report relied upon by the Appeals Council, among other things, to rule that the medicare program must pay the costs of BCBR. *In re*

(footnote continues)

Furthermore, respondents' interest in prompt resolution of the issues before the District Court often is founded upon life or death concerns and always is predicated upon a personal interest in restoring their ability to function as viable human beings. Petitioner wholly ignores the fact that the BCBR Ruling—and the necessity of litigating to obtain benefits —often precludes or delays beneficiaries, such as plaintiff Ringer, from obtaining treatment. In another case where it was claimed that such delay was of no consequence this Court has said:

> To allow a serious illness to go untreated until it requires emergency hospitalization is to subject the sufferer to the danger of a substantial and irrevocable deterioration in his health. Cancer, heart disease, or respiratory illnesses, if untreated for a year, may become all but irreversible paths to pain, disability, and even loss of life. The denial of medical care is all the more cruel in this context, falling as it does on indigents who are often without the means to obtain alternative treatment. [Footnote omitted].

Memorial Hospital v. Maricopa County, 415 U.S. 250, 261 (1974).

This case demonstrates the cold, hard human realities anticipated in *Memorial Hospital.* Two of the original, named plaintiffs in this case have died since the complaint was first filed. A third plaintiff's condition deteriorated to the point that BCBR was done on an emergency basis. The Secretary stipulated in the District Court that a fourth plaintiff would testify that BCBR has been prescribed to relieve "severe breathing difficulties" suffered as a symptom of "severe lung disease," but that he was unable to obtain BCBR because of

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(footnote continues)

Ferguson, No. 126-12-3830 at 18 (HHS Appeals Council, October 18, 1978). In addition, while the Secretary argues that exhaustion will permit development of an administrative record for judicial review, Petition at 24, the Court of Appeals pointed out that "an extensive record has been compiled in the administrative proceedings held thus far, to which the court could look to determine any facts that it might find useful." *Ringer v. Schweiker,* 697 F.2d 643, 646 n.1 (9th Cir. 1982).

inability to pay the cost of the treatment. Because of their physical condition and their dependency upon the health insurance coverage provided by medicare, respondents clearly have raised at least a colorable claim that erroneous denial (and delay) in the payment of benefits will damage them "in a way not recompensable through retroactive payments." *Mathews v. Eldridge,* 424 U.S. 319, 331 (1976). Petitioner has pointed to no interest in further exhaustion sufficiently compelling to overcome respondents' interest in their life and health.

The Court of Appeals conclusion that the BCBR Ruling "makes clear that the Secretary will treat as final any denial of benefits for the BCBR operation," 697 F.2d at 1295, also is consistent with the holdings of other Courts of Appeals. In circumstances similar to the present case, the Second Circuit has found that even informal republication of a similar policy statement during litigation challenging that policy was sufficient to confer subject matter jurisdiction:

> We note . . . that the Secretary has had ample opportunity since the decision below to modify his position to conform to the Appeals Council rulings. Instead, during the pendency of this appeal, he has distributed new forms [reaffirming the policy rejected by the Appeals Council]. We agree with the Third Circuit that a "final position" by the Secretary may, in some circumstances, amount to a "final decision". [Citations omitted]. We find that under the circumstances here there is subject-matter jurisdiction in the District Court.

Jones v. Califano, 576 F.2d 12, 19 (2nd Cir. 1978). *See also Liberty Alliance for the Blind v. Califano,* 568 F.2d 333, 346 (3rd Cir. 1977); *Ellison v. Califano,* 546 F.2d 1162, 1164 (5th Cir. 1977); *DeLao v. Califano,* 560 F.2d 1384, 1388 (9th Cir. 1977); *Wilson v. Edelman,* 542 F.2d 1260, 1271-74 (7th Cir. 1976).[9]

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[9] The cases cited by petitioner as standing for the proposition that exhaustion is still required even if the administrative process might not resolve the claims in the claimant's favor are inapposite. Petition at 23. The cases cited by petitioner noted that relief might still have been available through the administrative process. Here the Secretary insists that the payment ban is

(footnote continued)

Jurisdiction over this case is available under 42 U.S.C. § 405(g). The ruling of the Court of Appeals is not only consistent with *Weinberger v. Salfi*, 422 U.S. 749 (1975) and with *Mathews v. Eldridge*, 424 U.S. 319 (1976), but is dictated by this Court's holding in *Mathews v. Diaz*, 426 U.S. 67 (1976). Review should be denied.

III. The Court Of Appeals Properly Held That Respondents' Claims Fall Within The District Court's Mandamus Jurisdiction.

Petitioner dismisses in a footnote the Court of Appeals holding that jurisdiction under the mandamus statute, 42 U.S.C. § 1361, is available with respect to respondents' procedural claims. The Court of Appeals ruling with respect to the availability of mandamus jurisdiction is not only correct, it is also consistent with the holding of virtually every other court which has addressed the question squarely. Moreover, as in *Califano v. Yamasaki*, 442 U.S. 682, 698 (1978), it is unnecessary to determine the availability of mandamus jurisdiction because, as discussed previously, it is apparent that jurisdiction is available under 42 U.S.C. § 405(g).

The Courts of Appeals consistently have held that jurisdiction to review administrative action exists under Section 1361 where an administrative agency "owes the plaintiff a clear duty to act." *Ellis v. Blum*, 643 F.2d 68, 81 (2nd Cir. 1981) (Friendly, J.).[10] *See also American Assoc. of Councils of Medical Staffs v. Califano*, 575 F.2d 1367, 1373 (5th Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); *Barnett v. Califano*, 580 F.2d 28, 31 (2nd Cir. 1978); *Matos v. Secretary of H.E.W.*,

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(footnote continues)

absolute. Petition at 6. In addition, the cases involve claims for hospital reimbursement and do not involve claims by individual claimants that the benefit review procedures are illegal.

[10] Care should be taken to distinguish cases, including some arising in the social security context, where a *writ* of mandamus was denied because the party seeking the writ had failed to allege or to demonstrate the traditional prerequisite to mandamus jurisdiction, *i.e.*, the existence of a judicially enforceable duty. *Compare, e.g., Hadley Memorial Hospital, Inc. v. Schweiker*, 689 F.2d 905, 912 (10th Cir. 1982); *Americana Healthcare Corp. v. Schweiker*, 688 F.2d 1072, 1083-87 (7th Cir. 1982); *Cervoni v. Secretary of Health Education & Welfare*, 581 F.2d 1010, 1019-20 (1st Cir. 1978) *with Mattern v. Weinberger*, 519 F.2d 150, 155-57 (3rd Cir. 1975), *vacated on other grounds*, 425 U.S. 987 (1976) and *with* the other cases cited in the text.

581 F.2d 282, 286 n.6 (1st Cir. 1978); *Association of American Medical Colleges v. Califano,* 569 F.2d 101, 113 (D.C. Cir. 1977); *Elliott v. Weinberger,* 564 F.2d. 1219, 1226-27 (9th Cir. 1977); *Ryan v. Shea,* 525 F.2d 268, 271-72 (10th Cir. 1975); *Mattern v. Weinberger,* 519 F.2d 150, 155-57 (3rd Cir. 1975), *vacated on other grounds,* 425 U.S. 987 (1976); *Frost v. Weinberger,* 515 F.2d 57, 62 (2nd Cir. 1975), *cert. denied,* 424 U.S. 958 (1976); *Martinez v. Richardson,* 472 F.2d 1121, 1125-26 (10th Cir. 1973).

In contrast to petitioner's argument, the Courts of Appeals which have addressed the question directly have held that the authors of Section 405(h) could not have intended to preclude Section 1361 mandamus jurisdiction because, as petitioner admits, the statutory grant of mandamus jurisdiction did not exist at the time the Social Security Act's jurisdictional limitations were enacted. Moreover, as one court has held:

> when Congress enacted § 405(h) in 1939, it did not bar the District of Columbia courts from issuing writs of mandamus against the Secretary's predecessor, and that when the power to issue such writs was decentralized in 1962, it did not then suddenly become subject to § 405(h)'s stricture.

Ellis v. Blum, 643 F.2d 68, 81 (2nd Cir. 1981). *See also Elliott v. Weinberger,* 564 F.2d 1219, 1227 n.12 (9th Cir. 1977). *Cf. West Coast Exploration Co. v. McKay,* 213 F.2d 582, 592 (D.C. Cir.) (*en banc*), *cert. denied,* 347 U.S. 989 (1954). ("[T]he United States District Court for the District of Columbia has long exercised jurisdiction in cases in which mandatory relief compelling the performance by a federal officer of a clear legal duty is sought.") Furthermore, "[t]his conclusion is fortified by the knowledge that when Congress desired to prohibit actions in the nature of mandamus to review decisions involving the dispensation of another type of federal disability benefit, it did so expressly." *Ellis v. Blum,* 643 F.2d 68, 81 n.14 (2nd Cir. 1981). Despite regular rulings by the Courts of Appeals holding that mandamus jurisdiction is available in the present circumstances, the statutory bar is, and always has been, limited

to preclusion of jurisdiction under specified jurisdictional provisions. The choice to bar jurisdiction only under specified statutes must be viewed as deliberate and should be respected.[11]

Notwithstanding petitioner's argument to the contrary, this case plainly is appropriate for the exercise of mandamus jurisdiction. Respondents have alleged that the Secretary violated specific statutory and constitutional duties.

For example, respondents have alleged that the Secretary has an obligation under Section 405(h)—the very same section petitioner asserts precludes jurisdiction here—to conform his benefit review procedures to the decisions of the Administrative Law Judges and the Appeals Council. The first sentence of that provision states:

> The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing.

42 U.S.C. § 405(h). It has been held that "the obvious purpose of [Section 405(h)] is to declare that res judicata principles are applicable to the findings and decisions of the SSA made in certain procedural contexts." *Stuckey v. Weinberger,* 488 F.2d 904, 909-910 (9th Cir. 1973). *Cf. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, Inc.,* 402 U.S. 313, 339-342 (1971). The Secretary plainly has no discretion to ignore the statutory mandate.[12]

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[11] Petitioner's alternative argument—that the second sentence of Section 405(h) bars mandamus jurisdiction even if the third does not—is wholly without merit. Insofar as this case is concerned the sentence states that no findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or government agency except as herein provided. The Court of Appeals decision plainly does not authorize mandamus to review findings of fact or a decision by the Secretary denying benefits. Instead, the ruling expressly limits the availability of mandamus to procedural questions. *Ringer v. Schweiker,* 697 F.2d 1291, 1294, 1296 (9th Cir. 1982).

[12] Petitioner's argument that mandamus is inappropriate because of the "discretionary and judgmental nature of the Secretary's decision," Petition at 16 n.12, ignores wholly the duties alleged by respondents. It is ludicrous to suggest, as petitioner appears to do, that the jurisdictional preclusion contained in the second and third sentences of Section 405(h) is mandatory and judicially enforceable, but the res judicata principles contained in the first sentence of the same section are merely advisory and not subject to judicial enforcement.

In addition, the complaint alleges that the Secretary has a constitutional duty under the due process clause to conform her claims review process to the decisions of the Administrative Law Judges and the Appeals Council. While the Secretary ignores such allegations, the Courts of Appeals have found federal agencies bound by precisely the constitutional duty alleged by respondents. *See, e.g., Jones v. Califano,* 576 F.2d 12, 18 (2nd Cir. 1978) ("[T]he Secretary's refusal to follow the rulings of his own Appeals Council raises colorable questions of equal protection and due process."); *Continental Can Co. v. Marshall,* 603 F.2d 590 (7th Cir. 1979). *Cf. Montana v. United States,* 440 U.S. 147 (1979); *Parklane Hosiery Co v. Shore,* 439 U.S. 322 (1979); *Starker v. United States,* 602 F.2d 1341 (9th Cir. 1979).

The duty alleged by respondents has been recognized and enforced by the courts in virtually identical circumstances and plainly is sufficient to bring this action within the District Court's mandamus jurisdiction. Review is unwarranted.

IV. The Court Of Appeals Ruling That Respondents' Claims May Be Heard Under 28 U.S.C. § 1331 Is Not Inconsistent With Prior Decisions Of This Court.

Because 42 U.S.C. § 405 establishes a jurisdictional base for this case irrespective of whether respondents' claims are characterized as claims for benefits or as procedural claims, it is unnecessary to consider petitioner's argument that the Court of Appeals mischaracterized such claims as procedural and erroneously asserted federal question jurisdiction, 28 U.S.C. § 1331. *See, e.g., Califano v. Yamasaki,* 442 U.S. 682, 698 (1978). However, petitioner's claim that *Salfi* and *Eldridge* preclude federal question jurisdiction here is plainly wrong. In fact, the differences between the present case and *Salfi* and *Eldridge* demonstrate that the Court of Appeals characterization of respondent's principal claims was correct and that federal question jurisdiction was properly asserted.

The significance of characterizing respondents' lawsuit as an action to recover medicare "benefits" derives solely from 42 U.S.C. § 405. As the Court of Appeals noted, Section 405, "the statute limiting the jurisdictional basis of claims arising under

the Medicare Act has a relatively narrow scope". *Ringer v. Schweiker,* 697 F.2d 1291, 1293 (9th Cir. 1982). Thus, it has been held that "§ 405(h) addresses only those actions brought 'to recover on any claim' it does not preclude the instant suits, which are not for the recovery of benefits." *Elliott v. Weinberger,* 564 F.2d 1219, 1227 n.11 (9th Cir. 1977). If the action is not one "to obtain payments pursuant to the Medicare Act," *St. Louis University v. Blue Cross Hospital Service,* 537 F.2d 283, 289, 291-92 (8th Cir.), *cert. denied,* 429 U.S. 977 (1976), and "granting the relief requested [will not] result in an entitlement to benefits," *Elliott v. Weinberger,* 564 F.2d 1219, 1226 (9th Cir. 1977), the action is not one brought to recover on a claim subject to Section 405(h). *See also Humana of South Carolina, Inc. v. Schweiker,* 590 F.2d 1070, 1080 (D.C. Cir. 1978). *Cf. Wright v. Califano,* 587 F.2d 345, 349-50 (7th Cir. 1978).

Tested against such a standard, it is clear that respondents do not seek to "recover on a claim" and, accordingly, jurisdiction is not restricted by Section 405. Respondents do not seek any monetary payment under the medicare act, nor do they seek a declaration of entitlement to benefits which will automatically result in the payment of medicare funds. In the Court of Appeals the Secretary expressly acknowledged that respondents "do not pray for the payment of money." (Appellee's Brief at 14).

Respondents repeatedly have stated that the District Court should not redetermine the substantive validity of the Secretary's Ruling. In fact, a cornerstone of respondents' principal claim is that the substantive determination of BCBR's safety and efficacy already has been made on behalf of the Secretary by the ALJs and by the Appeals Council and that, under 42 U.S.C. § 405(h) and the due process clause, such determination is binding upon the District Court as well as the Secretary. The injury which respondents allege is that the Secretary forces them to relitigate repeatedly issues which the Secretary has no right to litigate. Thus, even if respondents are successful in this litigation, and the Secretary is precluded from requiring repeated relitigation, BCBR claimants for medicare benefits will

still be required to pursue their claims for payment through the administrative process, as have respondents here. The Secretary would still be free to deny claims for BCBR if the treatment was not reasonable and necessary for any reason other than those previously resolved in the administrative process. On the other hand, if respondents are forced to submit to the illegal review process before judicial determination of their principal claims that the process is unlawfully constituted, the claims very well may become moot.

Comparison of the nature of the relief sought by respondents here with the relief sought in *Weinberger v. Salfi*, 422 U.S. 749 (1975) and *Mathews v. Eldridge*, 424 U.S. 319 (1976) demonstrates the fallacy of petitioner's contention that the Court of Appeals ruling is inconsistent with the rulings of this Court. Plaintiffs in *Salfi* and *Eldrige* brought suit "seeking increased reimbursement under the Social Security Act." Petition at 13. Thus, unlike respondents here, plaintiffs in both *Salfi* and *Eldridge* sought and received relief from the lower courts which included payment of benefits under the Social Security Act—benefits which they otherwise never would have received.

This Court's decision in *Salfi* repeatedly emphasizes that the jurisdictional restrictions of 42 U.S.C. § 405(h) applied because it is "Social Security benefits which appellees seek to recover." 422 U.S. at 760. *See also id.* at 755, 761. Similarly, in *Eldridge* while plaintiff challenged the Secretary's procedures, he also claimed an immediate right to payment of benefits under the Social Security Act. 424 U.S. at 319. In contrast, respondents here have not requested payment of benefits, but as the Court of Appeals held, have "sought, first and foremost, to invalidate the Secretary's procedure." 684 F.2d at 646. *See also St. Louis University v. Blue Cross Hospital Service*, 537 F.2d 283, 292 (8th Cir. 1976) (Jurisdiction not barred where relief "will not necessarily affect the University's entitlement to reimbursement or the amount allowed.").[13]

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[13] Petitioner's claim that Section 405(h) limits jurisdiction even if the claims are in fact procedural rather than claims for benefits is supported by neither the statute nor the cases cited. Section 405(h) by its terms applies only to actions seeking to recover on a claim araising under the Medicare Act. Further, contrary to petitioner's argument, neither *Mathews v. Eldridge*, 424

(footnote continued)

Granting the relief sought by respondents will not result in the payment of benefits and, consequently, this action is not one to recover medicare benefits subject to the restrictions of 42 U.S.C. § 405(h).[14]

(footnote continues)

U.S. 319 (1976) nor *Califano v. Yamasaki*, 442 U.S. 682 (1979) holds that procedural claims *must* be brought under Section 405. Instead, even at their broadest reading, those cases merely stand for the proposition that a collateral procedural claim *may* be brought under Section 405 when coupled with a claim of entitlement to benefits.

[14] Petitioner also argues that review is warranted to resolve a conflict between the Circuits over the question whether 42 U.S.C. § 405(h) precludes federal question jurisdiction over claims that are procedural in nature. This case is not the case in which any such conflict should be resolved. First, the conflict alleged by petitioner exists, if at all, only with respect to whether 42 U.S.C. § 405(h) "bars federal question jurisdiction over Administrative Procedure Act ("APA") and related procedural challenges". Petition at 15. In this case the Court of Appeals did not address respondents' APA claims separately, but subsumed such claims in its general ruling. If this Court is to address the alleged conflict it would be more appropriate to do so in the context of a case in which the issue is raised directly and addressed expressly. Further, most, if not all, of the cases which petitioner claims hold that federal question jurisdiction is barred over purely procedural claims involved challenges which, if successful, would have resulted directly and automatically in increased reimbursement under the Social Security Act. *Compare Hadley Memorial Hospital, Inc. v. Schweiker*, 689 F.2d. 905 (10th Cir. 1982) (Challenge to rule limiting reimbursement of hospital costs for malpractice coverage) and *Trinity Memorial Hospital of Cudahy, Inc. v. Associated Hospital Service, Inc.*, 570 F.2d. 660, 663 (7th Cir. 1977) ("Trinity sought as relief a judgment that the . . . Secretary be ordered to refund the reimbursable costs in the sum of $61,567 or $42,536 . . . .") *with National Assoc. of Home Health Agencies v. Schweiker*, 690 F.2d 932, 937-38 (D.C. Cir. 1982), *cert. denied*, ____U.S.____, 103 S. Ct. 1193 (1983) (Jurisdiction over action is not precluded where "reimbursement is not its ultimate goal."). Consequently, insofar as the issues here are concerned, the conflict perceived by petitioner is more perceived than real. *Compare Daniel Freeman Memorial Hospital v. Schweiker*, 656 F.2d 473 (9th Cir. 1981) *with Ringer v. Schweiker*, 697 F.2d 1291, 1294 (9th Cir. 1982). Moreover, petitioner ignores the fact that in all of the decisions allegedly holding that review of procedural claims must be channeled through 42 U.S.C. § 405, the claims could have been raised in the administrative process and effective relief awarded, either by the agency or on judicial review if deserved. Here, of course, respondents contend that the benefit determination procedures are unlawful. Thus, if they are forced to submit to such procedures their principal claims may be moot and the injury will be complete and irremediable.

V. Petitioner's Claim That The Court Of Appeals Decision Will Disrupt The Administration Of The Medicare Program Is Erroneous.

Petitioner's final appeal for review by this Court rests on the claim that, unless overturned, the decision of the Court of Appeals will open the floodgates of litigation and "substantially" disrupt "the orderly and efficient administrative determination of claims for benefits under the Medicare Program and the Social Security Act generally." Petition at 24. Petitioner wholly ignores the unique factual circumstances in which the present case arose. Further, the objective evidence flatly refutes the Secretary's exaggerated 'floodgates of litigation' argument.

This case arose in a factual setting which the Second Circuit has characterized accurately as "unusual" and raises jurisdictional issues which that court properly labeled "novel". *Jones v. Califano,* 576 F.2d 12, 17, 22 (2nd Cir. 1978). Specifically, this case was filed because the Secretary persists in ignoring and, indeed, in flaunting the decisions of ten different ALJs (rendered in twenty-six consolidated cases) and of her own Appeals Council which, prior to the BCBR Ruling, consistently rejected the Secretary's absolute prohibition on payment for BCBR. Respondents' essential grievance is that the Secretary unlawfully forces them to relitigate repeatedly a single issue which, prior to issuance of the BCBR Ruling, the Agency always lost.

The reason petitioner ignores the factual circumstances of the present case is obvious. In over forty years since the Social Security Act has been law there is *one* other reported decision in which a plaintiff challenged the Secretary's failure to adhere to the decisions of her ALJs and the Appeals Council. *See Jones v. Califano,* 576 F.2d 12 (2nd Cir. 1978).[15] Moreover, although the *Jones* court held, like the Court of Appeals here, that it had jurisdiction, in more than four years since the Second Circuit

[15] The *Jones* case involved a mere four administrative decisions rejecting the Secretary's policy. The Second Circuit found jurisdiction under 42 U.S.C. § 405(g).

decision, there had not been another factually similar reported case until this action. In fact, aside from *Jones,* there is only one other reported decision involving *any* other federal agency which addresses the specific factual and jurisdictional issues raised by respondents here. *See Continental Can Co. v. Marshall,* 603 F.2d 590 (7th Cir. 1979). The objective evidence—the absence of factually similar cases despite a Second Circuit ruling virtually identical to that issued by the Court of Appeals here—simply does not support petitioner's claim that the Court of Appeals decision threatens substantial disruption in the administration of the medicare program.

Finally, the practical implications of the Secretary's arguments against jurisdiction should not be ignored. As the Second Circuit has pointed out, claimants who receive favorable ALJ decisions have neither the desire nor the right to appeal such decisions to federal district court. *Jones v. Califano,* 576 F.2d 12, 18 (2nd Cir. 1978). The Secretary, of course, has no right to appeal her own decisions. The lack of appeal in such circumstances is to be expected but it does not take into account the unusual situation where, as was the case here prior to the Ruling, the ALJs and Appeals Council consistently rule "in favor of claimants and the Secretary refuses to implement the method of benefit calculation adopted by his Appeals Council." *Id.* at 18.

Congress decreed that the findings and decisions of the Secretary after a hearing were binding upon all parties to the hearing, the Secretary as well as the claimant. 42 U.S.C. § 405(h). The same Congress could not have intended to permit the absurd result for which the Secretary argues here. Unless jurisdiction is available to compel the Secretary to modify positions consistently rejected by his own ALJs, the Agency will be able to flaunt the ALJ decisions, to force claimants to relitigate repeatedly the same legal issues and to operate indefinitely pursuant to illegal policies.

CONCLUSION.

The Secretary's insistence that elderly and disabled medicare beneficaries must relitigate repeatedly issues which she has repeatedly lost is both unlawful and fundamentally unjust. The Court of Appeals holding will permit the District Court to correct the injustice. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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May, 1983

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FILED
JUN 15 1983
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In the Supreme Court of the United States

OCTOBER TERM, 1982

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

FREEMAN H. RINGER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the petition for a writ of certiorari, we demonstrate that the court of appeals' holdings—(i) that certain aspects of respondents' claims may be brought under 28 U.S.C. 1331 notwithstanding the explicit jurisdictional bar in 42 U.S.C. 405(h); and (ii) that respondents may bypass the statutorily mandated exhaustion of administrative remedies as regards the remaining aspects of their claims—are inconsistent with this Court's decisions in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), and *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), and add to a growing conflict among the circuits on these questions. In nevertheless opposing certiorari, respondents seriously misread the decisions in *Weinberger* v. *Salfi, supra,* and *Mathews* v. *Eldridge, supra* (compare Pet. 10-13, 17-19, 22-23, with Br. in Opp. 8-13, 20-22); fail to acknowledge that the facts of their individual claims do not even fit the theory on which they seek to

defend the judgment below (see Pet. 19-22; pages 5-6, *infra*); and largely ignore the clear conflicts among the circuits on the questions presented (compare Pet. 13-15, 16 n.12, 23-24, with Br. in Opp. 15 n.9, 22 n.14) and the substantial practical importance of those questions (see Pet. 24-26).

1. Respondents repeatedly refer (Br. in Opp. 2, 4-5, 13-14 n.8, 18-19) to the decision by the HHS Appeals Council in *In re Ferguson*, No. 126-12-3830 (Oct. 18, 1979),[1] involving claims of other individuals for payment for the BCBR surgery, as a decision that should bind the Secretary in the nationwide administration of the Medicare Program on the question whether the BCBR procedure has been shown to be safe and effective and thus is a "reasonable and necessary" medical service for which payment may be made. See 42 U.S.C. (Supp. V) 1395y(a)(1). Accordingly, respondents maintain (Br. in Opp. 2, 12, 13-14 n.8, 18-19, 20, 23) that they should not be required to "relitigate" this question by exhausting available administrative remedies on their individual claims. This argument is wholly without merit.

As an initial matter, respondents fail to point out that the Appeals Council carefully limited its decision permitting payment for BCBR in *In re Ferguson*, expressly stating that it "applie[d] only to [that] case and several related cases"; accordingly, the Appeals Council stressed that it did "not intend that this conclusion be regarded as definitive as to the issues raised" and that its decision was "not to be cited as precedent." Slip op. 23. The Appeals Council expressed its conclusion in this tentative manner because of what it regarded as the "equivocal" and "inconclusive" nature of the evidence on the efficacy of the procedure, the "lack of any pertinent regulations," and the absence of any extensive study of the procedure (*id.* at 18, 19).

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[1]We have lodged a copy of the Appeals Council's decision in *In re Ferguson* with the Clerk of this Court.

Thus, even assuming arguendo the validity of the truly novel proposition advanced by respondents (Br. in Opp. 2, 12, 13-14 & n.8, 18-19, 20, 23) that the Secretary could be collaterally estopped by a prior decision of her own Appeals Council from issuing a regulation barring payment for a particular medical procedure on the basis of her determination that the procedure had not been shown to be sufficiently safe and effective to qualify for reimbursement under the Medicare Program (cf. *Heckler* v. *Campbell*, No. 81-1983 (May 16, 1983), slip op. 7-10),[2] the tentative and non-precedential Appeals Council decision in *In re Ferguson* relied upon here plainly could not be given that collateral estoppel effect.[3] See Pet. App. 16a. Moreover, the Secretary's formal ruling barring reimbursement for BCBR now has supplied the "pertinent regulation[]" on the question of the safety and efficacy of the procedure that was lacking when the Appeals Council decided *In re Ferguson* without such guidance.

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[2]Respondents rely (Br. in Opp. 18) for their collateral estoppel argument on the first sentence of 42 U.S.C. 405(h), which provides that "[t]he findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing." The only authority respondents cite in support of their argument is *Stuckey* v. *Weinberger*, 488 F.2d 904, 909-910 (9th Cir. 1973). That case, however, applied the doctrine of res judicata, not collateral estoppel, to bar a claim by an individual for disability benefits on the ground that he had been found in prior proceedings not to be disabled. This holding plainly was required by the terms of Section 405(h), quoted above. But this principle of finality in the determination of an individual claim (see *Califano* v. *Sanders*, 430 U.S. 99 (1977)) surely does not suggest that a decision by even a single ALJ on a question of general importance under the Social Security Act must thereafter bind the Secretary in the nationwide administration of the Act, as the logic of respondents' argument would appear to require.

[3]A fortiori, the ALJ decisions referred to by respondents (Br. in Opp. 2, 18-19, 20, 23), which permitted payment for BCBR in individual cases but were never reviewed by the Appeals Council, could not estop the Secretary from promulgating the regulation.

In any event, there is no reason why respondents should not be required to present their collateral estoppel argument in the course of the administrative proceedings before presenting it to the courts, just as they must do with respect to other arguments in support of reimbursement. This would permit the ALJ and Appeals Council to conduct an inquiry into the precedential nature of the prior administrative decisions (including *In re Ferguson, supra*) that respondents contend should be given preclusive effect. Moreover, the ALJ and Appeals Council might conclude that the prior decisions should be followed as a matter of administrative stare decisis, thereby obviating any need to resolve the collateral estoppel issue. And exhaustion of administrative remedies on the collateral estoppel issue at least would assure that the court, on judicial review under 42 U.S.C. (Supp. V) 405(g), would have the benefit of the Secretary's interpretation of the Social Security Act with regard to the application of collateral estoppel in administrative proceedings. Cf. *W.R. Grace & Co.* v. *Local 759, Int'l Union of Rubber Workers*, No. 81-1314 (May 31, 1983), slip op. 7-8.

Respondents have not identified any irreparable injury that they might suffer if judicial resolution of their collateral estoppel and related due process/equal protection arguments were to await completion of the administrative process. Compare *Mathews* v. *Eldridge, supra*, 424 U.S. at 331. Nor is any such injury apparent. This Court has made clear, for example, that the mere fact that a party must assume whatever burden might be entailed in participation in administrative proceedings does not constitute irreparable injury warranting the bypassing of those proceedings in favor of immediate judicial review. See, *e.g.*, *FTC* v. *Standard Oil of California*, 449 U.S. 232, 244 (1980). Nor, contrary to respondents' suggestion (Br. in Opp. 21), does the fact that respondents might prevail in administrative

proceedings and thereby moot the issue on which judicial review now is sought warrant immediate judicial review. Indeed, one of the principal reasons to await the termination of agency proceedings is that the agency's consideration of the matter might obviate all occasion for judicial review. 449 U.S. at 244 n.11.[4]

2. Respondents contend (Br. in Opp. 2, 5-7, 8, 10-12, 14-15, 20, 23) that the October 1980 ruling by the Secretary that BCBR is not a "reasonable and necessary" medical service for which payment may be made under the Act demonstrates that exhaustion of administrative remedies prior to filing this suit would have been futile. Once again, however, respondents, like the court of appeals, have chosen to ignore the fact that this ruling is irrelevant to the resolution of their individual cases.

A class was not certified in district court, and, as a result, there are only four respondents whose claims are before the Court.[5] The 1980 ruling does not apply to three of these four respondents, because they had their BCBR surgery before the ruling was promulgated. See Pet. 20-21. The fourth respondent, Freeman Ringer, had not had BCBR surgery when this action was filed, and thus had not even satisfied the non-waivable jurisdictional prerequisite of filing a claim for payment. *Mathews* v. *Eldridge, supra*, 424 U.S. at 330;

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[4]Respondents' extensive reliance (Br. in Opp. 2-3, 15, 19, 23-24) on *Jones* v. *Califano*, 576 F.2d 12 (2d Cir. 1978), which predated this Court's decision in *FTC* v. *Standard Oil of California, supra*, therefore is misplaced.

[5]Dr. Winter, who performed the surgery for virtually all of the Medicare beneficiaries for whom reimbursement was sought, also was a plaintiff in district court and is a respondent in this Court. However, respondents do not contend that Dr. Winter has standing in his own right to challenge HHS's policy regarding the payment of hospitals under Part A of the Act for their expenses in connection with BCBR surgery.

Schweiker v. *Hansen*, 450 U.S. 785, 790 (1981).[6] No question of exhaustion of administrative remedies therefore was raised by Ringer's claim. Respondents' reliance on the 1980 ruling to excuse exhaustion of administrative remedies on their individual claims accordingly is wholly misplaced. This fact vividly underscores the importance of adhering to the explicit exhaustion requirement in 42 U.S.C. (Supp. V) 405(g) and 42 U.S.C. 405 (h) even where a court might believe, perhaps on the basis of an erroneous understanding of the facts or governing procedures, that pursuit of the claims at the administrative level would be futile.

In any event, administrative procedures may not be circumvented in this case even if respondents were subject to the 1980 ruling. Full exhaustion of administrative remedies may be excused in only two narrow situations: where the Secretary has concluded that further administrative proceedings are not necessary, and where the claimant's interest in having a prompt resolution is so great that deference to the Secretary's judgment that further exhaustion should be required is inappropriate. *Weinberger* v. *Salfi, supra*, 422 U.S. at 766-767; *Mathews* v. *Eldridge, supra*, 424 U.S. at 330, 332. As we explain in the certiorari petition (at 17-23), it is clear that neither exception applies here.

Contrary to respondents' contention (Br. in Opp. 8, 10 12, 16), this Court's decision in *Mathews* v. *Diaz*, 426 U.S. 67 (1976), does not suggest a different result. The Court there simply concluded that the case was covered by the exception to the exhaustion requirement recognized in *Weinberger* v. *Salfi, supra*. The Court relied on three stipulations by the Secretary in district court: that no facts were

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[6]The administrative and judicial review process must be invoked by the submission of a claim for benefits for services already furnished. See 42 U.S.C. 1395ff(b); 42 U.S.C. (& Supp. V) 1395f(a); 42 U.S.C. (Supp. V) 405(b); 42 C.F.R. 405.1662-405.1667.

in dispute, that the case was ripe for disposition by summary judgment, and that the only issue to be decided was the constitutionality of the statutory provision under which the claimant was denied benefits—an issue, the Court noted, that was "beyond the Secretary's competence." 426 U.S. at 76-77 & n.11. These stipulations, the Court concluded, were "tantamount to * * * a waiver of the exhaustion requirements." *Id.* at 77.

Here, by contrast, the central issue is whether a particular medical procedure is "reasonable and necessary" and thus qualifies for reimbursement under the Medicare Act. This question not only is within the Secretary's competence; it is specifically entrusted to her for determination. 42 U.S.C. 1395ff(a). Moreover, whether a given procedure is "reasonable and necessary," unlike the constitutional issue involved in *Mathews* v. *Diaz*, depends on factual determinations that may be related to other issues in the case and that therefore are most appropriately considered by a court after the Secretary has rendered a "final decision" on all aspects of the particular claim. See *Smith* v. *Schweiker*, No. 82-6272 (2d Cir. June 1, 1983), slip op. 9. If the claimant wishes to challenge the factual premises of a rule of general applicability denying payment for the procedure, any evidentiary submissions deemed relevant for this purpose must be presented in the administrative proceedings.

3. Apparently recognizing the weakness of their legal arguments, respondents suggest that circumvention of the administrative process nevertheless should be permitted in this case because the issues involve matters of "life and death" (Br. in Opp. 14; see also *id.* at 7). This contention, too, is simply wrong. As an initial matter, respondents concede (Br. in Opp. 3 n.2) that BCBR does not cure pulmonary disease but only treats its symptoms. Moreover, the question of exhaustion of administrative remedies arises

only *after* a person has satisfied the jurisdictional prerequisite of filing a claim for benefits. Because an individual cannot file a claim for benefits for BCBR unless he already has undergone the surgery (see note 6, *supra*), adherence to the normal exhaustion requirements obviously will not result in postponement of the surgery and resulting injury to the claimant. By the same token, an individual who has not yet had the surgery has no right to institute administrative proceedings for a determination whether the surgery would be covered by Medicare if he were to undergo it. The requirement of exhaustion of remedies *after* the institution of these proceedings therefore cannot be said to injure these individuals.

4. Respondents' effort (Br. in Opp. 19-22) to support the court of appeals' assumption of jurisdiction over the case under 28 U.S.C. 1331, notwithstanding the jurisdictional bar in 42 U.S.C. 405(h), also is wholly unavailing. As we have explained in the certiorari petition (at 10-13), this Court held in *Weinberger* v. *Salfi* that a suit challenging a *statutory prohibition* against the payment of benefits in a category of cases could not be brought under 28 U.S.C. 1331. A fortiori, a challenge to an *administrative ruling* barring payment in a category of cases likewise cannot be brought under 28 U.S.C. 1331.

Respondents seek to avoid this conclusion by arguing (Br. in Opp. 20-22) that they are not actually seeking to recover on a claim for benefits. This argument is spurious. It is clear beyond serious dispute that the purpose of this suit is to invalidate the Secretary's ruling that bars payment for BCBR so that respondents can secure reimbursment for the surgery. In conflict with the decision below, other courts of appeals have recognized that a judicial action seeking to invalidate a rule that limits or bars reimbursement in administrative proceedings falls within the jurisdictional bar in 42 U.S.C. 405(h) against bringing an action under 28 U.S.C.

1331 to recover on a claim arising under the Social Security Act. See Pet. 13-14.[7] That circuit conflict should be resolved by this Court.

For the foregoing reasons and the additional reasons stated in the petition for a writ of certiorari, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

JUNE 1983

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[7]We also note that another panel of the Ninth Circuit "reluctantly" followed the decision below in finding mandamus jurisdiction under 28 U.S.C. 1361 over a "procedural" claim arising under the Social Security Act. See *Powderly* v. *Schweiker*, 704 F.2d 1092, 1095 (1983).

DOJ-1983-06

Office-Supreme Court, U.S.
FILED
SEP 16 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1772

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

FREEMAN H. RINGER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the district court had jurisdiction under 28 U.S.C. 1331 or 1361 to consider respondents' challenge to the Secretary's denial of payment for particular services under the Medicare Program, notwithstanding the jurisdictional bar in 42 U.S.C. 405(h).

2. Whether respondents' failure to exhaust their administrative remedies barred them from seeking judicial review under 42 U.S.C. 405(g) of the administrative denial of their Medicare claims.

PARTIES TO THE PROCEEDING

The petitioner is the Secretary of Health and Human Services. The respondents are four individual Medicare beneficiaries—Freeman H. Ringer, Sanford Holmes, Norman R. Webster-Zieber, and Jean Vescio—and a physician, Benjamin Winter, who performs the medical procedure for which respondents contend the Secretary has erroneously denied coverage under the Medicare Program. These respondents sought to represent a class of Medicare beneficiaries who had undergone or desired to undergo the medical procedure, but the district court dismissed the suit for lack of jurisdiction before ruling on the class action issue. Pet. App. 11a.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals, as amended by orders dated December 30, 1982 and February 1, 1983 (Pet. App. 1a-10a), is reported at 697 F.2d 1291. A prior version of the opinion not incorporating the February 1, 1983 amendments is reported at 684 F.2d 643. The opinion of the district court (Pet. App. 11a-17a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1982 (Pet. App. 19a), and a petition for rehearing was denied on December 30, 1982 (Pet. App. 18a). By order dated March 22, 1983, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including April 29, 1983. The petition was filed on that date and was granted on June 27, 1983 (J.A. 34). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are reproduced in an Appendix to this Brief (App., *infra*, 1a-4a): 28 U.S.C. (Supp. V) 1331; 28 U.S.C. 1361; and Sections 205(g) and (h) and 1869(a) and (b) of the Social Security Act, 42 U.S.C. (& Supp. V) 405(g) and (h) and 1395ff(a) and (b).

STATEMENT

This case concerns the limitations on the jurisdiction of a federal district court over a suit challenging a decision by the Secretary of Health and Human Services (HHS) denying payment for a particular medical procedure under the Health Insurance for the Aged Act (42 U.S.C. (& Supp. V) 1395 *et seq.*), commonly known as the Medicare Act.

A. The Statutory And Administrative Scheme

The Medicare Program is divided into two parts. Part A of the Act (42 U.S.C. (& Supp. V) 1395c *et seq.*) provides insurance for the reasonable cost of hospital and related post-hospital services. 42 U.S.C. (& Supp. V) 1395c and 1395d. Part B of the Act (42 U.S.C. (& Supp. V) 1395j *et seq.*) establishes a voluntary program of supplementary medical insurance covering, in general, 80% of the reasonable charges for physicians' services, medical supplies, and laboratory tests. 42 U.S.C. (& Supp. V) 1395k, 1395*l* and 1395x(s).

1. *The Part B Program*

This Court recently considered the claims adjudication process and the availability of judicial review under the Part B Medicare program in *Schweiker* v. *McClure*, 456 U.S. 188 (1982), and *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982). The payment of benefits under Part B is administered by private insurance carriers pursuant to contracts entered into with the Secretary of Health and Human Services. 42 U.S.C. (& Supp. V) 1395u. The carrier makes payments on a claim either directly to the beneficiary or to the physician or other supplier

of services to whom the beneficiary has assigned his claim. 42 U.S.C. 1395u(b)(3)(B). The carrier must determine whether the services are covered by Part B and, if so, the reimbursable reasonable charge for the services. If the carrier finds that the services are not covered by Part B or determines that the payment due is less than the amount claimed, the beneficiary or his assignee is entitled to have the claim reconsidered by the carrier. 42 C.F.R. 405.807-405.812. If the claim again is denied and the amount remaining in controversy is $100 or more, the claimant is entitled to an oral hearing conducted by the carrier. 42 U.S.C. (& Supp. V) 1935u(b)(3)(C); see *Schweiker* v. *McClure*, *supra*, 456 U.S. at 191.

There is no provision for review by the Secretary of the carrier's final decision on a claim after the hearing. And in view of the relatively small amount of money involved in the typical Part B claim, Congress likewise foreclosed all judicial review of the carrier's determination. *United States* v. *Erika, Inc.*, *supra*, 456 U.S. at 208-211. Because this Court thus has made clear since this suit was filed that all judicial review of Part B claims is barred, the jurisdictional issues in this case now principally relate to the Part A program.

2. *The Part A Program*

The process for determining claims for hospital benefits under Part A of the Medicare Program is in many respects parallel to that under Part B. The Medicare Act directs the Secretary to determine benefit claims under Part A "in accordance with regulations prescribed by [her]" (42 U.S.C. 1395ff(a); see also 42 U.S.C. (& Supp. V) 1395f, 1395g and 1395x(v)), although she is authorized to enter into contracts with fiscal intermediaries under which the intermediaries determine whether particular services are covered by Part A and, if so, the amount of benefits that are payable. 42 U.S.C. (& Supp. V) 1395h; 42 C.F.R. 405.702. In view of the greater amount of money at stake in the typical Part A claim, however, Congress has provided for review by the Secre-

tary of the denial of a claim by an intermediary and a limited opportunity for judicial review of the Secretary's "final decision" denying such a claim. And unlike in the Part B program, Congress has provided for a bifurcated system of review of issues arising under Part A.

a. If the intermediary determines that particular services furnished by a hospital or other provider of services are not covered by Part A, the beneficiary is entitled to have that decision reconsidered by the Health Care Financing Administration (HCFA) in HHS. 42 C.F.R. 405.710-405.716. If HCFA determines that the services are not covered and the amount in controversy is $100 or more, the individual must be afforded an opportunity for an evidentiary hearing by the Secretary in the same manner as is provided in 42 U.S.C. 405(b) for old age, survivors, and disability claimants under Title II of the Act. See 42 U.S.C. 1395ff(b)(1)(C) and (2); 42 C.F.R. 405.720. The administrative law judge (ALJ) who conducts these hearings on behalf of the Secretary may decide a case on the written record if the individual waives his right to an oral hearing. 42 C.F.R. 405.701(c), incorporating 20 C.F.R. 404.948(b).

If the claim is denied by the ALJ, the beneficiary may seek review by the Appeals Council in HHS. 42 C.F.R. 405.701(c) and 405.724, incorporating 20 C.F.R. 404.967. If the Appeals Council also denies relief, the individual is entitled by 42 U.S.C. 1395ff(b)(1)(C) to judicial review of "the Secretary's final decision after such hearing" in the same manner as is provided in 42 U.S.C. 405(g) for claims arising under Title II of the Act. However, unlike under Title II, judicial review is available on a Part A Medicare claim only if the amount in controversy is $1000 or more. 42 U.S.C. 1395ff(b)(2); 42 C.F.R. 405.730; 20 C.F.R. 404.981 and 422.210.

Pursuant to her rulemaking authority in 42 U.S.C. 405(a)[1] and 1895hh, the Secretary has provided that a "final decision" subject to judicial review under 42 U.S.C. 405(g) is deemed to have been rendered only after the

[1] As made applicable to the Medicare Program by 42 U.S.C. 1395ii.

individual has "completed the steps of the administrative review process" described above—*i.e.*, an initial determination, reconsideration, an ALJ hearing, and Appeals Council review. See 42 C.F.R. 405.701(c), incorporating 20 C.F.R. 404.900(a)(5). The Secretary has fashioned only one narrow exception to this requirement, applicable to cases in which the facts and the Secretary's interpretation of the law are not in dispute and the only factor precluding an award is a statutory provision that the claimant alleges is unconstitutional. Compare *Weinberger* v. *Salfi*, 422 U.S. 749, 766-767 (1975). In such a case, the claimant and the Secretary may enter into a formal agreement that renders it unnecessary for the claimant to pursue administrative remedies beyond the reconsideration stage in order to obtain the requisite "final decision" for purposes of judicial review. See 42 C.F.R. 405.718-405.718e; 20 C.F.R. 404.923-404.928. But the Secretary has not authorized avoidance of the exhaustion requirement in any other situations, including cases such as that involved here, in which the claimant challenges the validity of an administrative instruction issued by the Secretary.

b. Different procedures have been established for administrative and judicial review of an intermediary's determination of the reasonable cost of services that it finds *are* covered by Part A of the Medicare Program. Payment for Part A services must be made directly to the hospital or other provider of the services, not to the beneficiary personally or his assignee, as under Part B. 42 U.S.C. (& Supp. V) 1395g. Nor is the provider reimbursed for Part A services on a claim-by-claim basis, as under Part B. Instead, funds are advanced to the provider at least monthly to cover the estimated cost of *all* services furnished by the provider to Medicare beneficiaries during the relevant period. A final settlement of the actual amount due for all such services then is made at the end of the accounting period, after the provider's total costs are allocated between its Medicare and non-Medicare patients in accordance with regulations prom-

ulgated by the Secretary. 42 U.S.C. 1395g(a); 42 C.F.R. 405.404, 405.405, 405.415 *et seq.* If the provider is dissatisfied with the intermediary's "final determination" of the total amount of payments due for the accounting period and the amount in controversy is $10,000 or more, the provider is entitled to an evidentiary hearing before the Provider Reimbursement Review Board (PRRB) appointed by the Secretary in HHS. 42 U.S.C. 1395*oo*(a). A provider that is dissatisfied with the "final decision" of the PRRB may obtain judicial review of that decision by filing a civil action in federal district court within 60 days. 42 U.S.C. (Supp. V) 1395*oo*(f)(1).

B. The Background And Proceedings In This Case

1. *Background*

Under 42 U.S.C. (Supp. V) 1395y(a)(1), payment may not be made under the Medicare Program for services that are "not reasonable and necessary for the diagnosis or treatment of illness or injury." The Secretary consistently has construed this provision to prohibit payment for services that are not recognized as an effective and proven treatment for a given medical condition; services that are experimental or investigational in nature are excluded from coverage. In applying this limitation, HCFA has instructed intermediaries and carriers that payment may be made if the particular service has come to be generally accepted by the professional medical community as an effective and proven treatment for the condition for which it is used. If the service is not generally accepted, however, authoritative evidence must be presented to establish it as safe and effective. See *Part A Intermediary Letter, No. 77-4 and Enclosure 2*, [1976 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 28,152 (Jan. 1977);[2] *Rush* v. *Parham*, 625 F.2d 1150, 1156 & n.11 (5th Cir. 1980).

[2] HHS stressed in *Intermediary Letter No. 77-4* that a determination that a particular procedure is excluded from coverage on this ground does not constitute a determination that the physician

Consistent with this policy, HCFA issued administrative instructions to Medicare Part A intermediaries and Part B carriers in January 1979 informing them that no payment was to be made for a surgical procedure known as bilateral carotid body resection (BCBR) when performed to relieve symptoms of pulmonary distress. See 45 Fed. Reg. 71431-71432 (1980) (reproducing the 1979 instructions). HCFA explained that BCBR had been "shown to lack general acceptance of the professional medical community" and that "controlled clinical studies establishing the safety and effectiveness of this procedure are needed" (*id.* at 71431). Accordingly, the instructions stated that BCBR operations to relieve pulmonary symptoms "must be considered investigational and cannot be considered reasonable and necessary within the meaning of [42 U.S.C. (Supp. V) 1395y(a)(1)]" (45 Fed. Reg. 71431).[3]

HCFA issued the instructions in 1979 on the basis of advice from the Public Health Service and a special BCBR Task Force of the National Heart, Lung and Blood Institute of the National Institutes of Health (Pet. App. 2a; 45 Fed. Reg. 71426). The Public Health Service had "consistently advised HCFA" that the BCBR procedure, when performed to relieve the symptoms of pulmonary conditions such as asthma and emphysema, lacked general acceptance by the professional medical community "because of questions concerning efficacy and safety" (*ibid.*). Similarly, the twelve-member Task Force was "unanimous in its view that before any procedure can

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has provided "improper treatment." HHS explained that the doctor is free to determine the treatment to be given, but that the Medicare Program "is not free to pay automatically for whatever items and services are involved in every course of treatment." *Id.* ¶ 28,152, at 10600.

[3] HCFA explained, however, that carotid body resection had been accepted by the medical community as effective to remove a mass in the carotid body itself, irrespective of symptoms, and that another specialized procedure in the carotid area also could be regarded as reasonable and necessary in appropriate circumstances (45 Fed. Reg. 71431-71432).

be recommended as a therapeutic measure there should be a clear demonstration of efficacy and documentation that risk is acceptably small"; in the case of BCBR, the Task Force concluded, "neither criterion is met" (*id.* at 71429). The Task Force further observed that "[e]ven in the hands of experienced surgeons the procedure has a significant in-hospital mortality rate, and theoretical considerations suggest that the risk of hypoventilation may be increased, especially in patients with chronic obstructive pulmonary disease" (*ibid.*).

Because HCFA instructions to Medicare Part A intermediaries are not binding on ALJs who preside at hearings on Part A claims, a number of Medicare beneficiaries were able to receive payment under Part A for the hospital-related expenses of BCBR notwithstanding the 1979 HCFA instructions by obtaining a favorable ruling on the coverage issue from an ALJ. The Appeals Council, which likewise is not bound by HCFA's intermediary instructions, also allowed payment in a consolidated decision involving a number of BCBR claimants. See *In re Ferguson*, No. 126-12-3830 (HEW App. Coun. Oct. 18, 1979).[4] The Appeals Council stressed, however, that its decision applied only to the particular claimants before it; that it did "not intend that this conclusion be regarded as definitive as to the issues raised"; and that its decision was "not to be cited as precedent" in other cases (slip op. 23). The Appeals Council expressed its findings about BCBR in this tentative manner because it regarded the evidence concerning the efficacy of the procedure and the risk involved as "equivocal" and "inconclusive" (slip op. 18, 19). The Appeals Council also noted the absence of any extensive studies of the procedure and the "lack of any pertinent regulations," and it

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[4] The carriers' denials of claims for reimbursement under Part B of the Medicare Program for physicians' and other services in connection with BCBR surgery could not be appealed administratively to HHS (see page 3, *supra*), and the carriers' denials of coverage pursuant to the 1979 HCFA instructions therefore were final and binding on the claimants.

urged HCFA to take action with respect to "clarifying regulations" (slip op. 18).

In response to these developments, on October 28, 1980, HCFA issued a formal administrative ruling—binding upon ALJs and the Appeals Council—that prohibited payments under Medicare for BCBR performed after that date. 45 Fed. Reg. 71426-71427 (1980); see 20 C.F.R. 422.408. HCFA explained that it has construed the statute to bar payment for services "that are not demonstrated to be safe and effective by acceptable clinical evidence" (45 Fed. Reg. 71426) and that, after reviewing the proceedings in *In re Ferguson* and consulting once more with the Public Health Service, it again was unable to find that BCBR is safe and effective (45 Fed. Reg. 71426-91427).

2. *The Proceedings In This Case*

a. This suit was filed in the United States District Court for the Central District of California on September 18, 1980, challenging the Secretary's policy with respect to payment for BCBR (E.R. 1-26).[5] An amended complaint was filed on November 7, 1980 (J.A. 9-28). The five plaintiffs named in the amended complaint—the respondents before this Court—are four individual Medicare beneficiaries and Dr. Benjamin Winter, a physician who developed what respondents termed the "Winter technique" of BCBR and performed the operation approximately 1,000 times (J.A. 11), and who is a principal proponent of BCBR surgery (see 45 Fed. Reg. 71427).

None of the four plaintiffs who are Medicare beneficiaries had received an Appeals Council decision on a claim for payment for BCBR at the time the amended complaint was filed. In fact, only three of the four Medicare beneficiaries—respondents Holmes, Webster-Zieber, and Vescio—had undergone BCBR surgery at that time. Respondents Holmes and Webster-Zieber had sought payment for their hospital and physicians' ex-

[5] "E.R." refers to the Excerpts of Record filed in the court of appeals.

penses in connection with their surgery under both Part A and Part B of the Medicare Program. Their Part A claims had been denied by the intermediary and by HCFA on reconsideration, but an ALJ had not yet held a hearing on the claims (J.A. 11; *In re Benjamin Winter, M.D., Representative for 132 Claimants* (SSA Off. Hear. App. Feb. 27, 1982), slip op. 5)). The Part B claims of these two respondents also had been denied by the responsible carrier (J.A. 11). Respondent Vescio had filed reimbursement claims for her BCBR surgery under Part A and Part B, but those claims had not been acted upon by the intermediary and carrier (J.A. 11; *In re Winter, supra*, slip op. 9). Respondent Ringer had not undergone the BCBR surgery when this suit was filed, and we have been informed by HHS that a search of its computer records does not disclose that he has ever filed a claim seeking payment for BCBR. These four respondents and Dr. Winter also sought to represent a class of Medicare beneficiaries who underwent or desire to undergo BCBR surgery for relief of chronic obstructive lung disease (J.A. 12), but the district court dismissed the suit for lack of jurisdiction before ruling on the question of class certification (Pet. App. 11a).

Respondents sought on a variety of grounds to prevent the Secretary from enforcing the 1979 instructions and the October 28, 1980 HCFA ruling barring payment for BCBR and to have the court declare that BCBR is a reasonable and necessary medical procedure (J.A. 25-27). They contended, *inter alia*, that the policy barring reimbursement for BCBR violated the requirement in 42 U.S.C. (Supp. V) 1395y(a)(1) that payment be made for "reasonable and necessary" services and was arbitrary and capricious under the Administrative Procedure Act (APA) (5 U.S.C. 706(2)), under the provision in 42 U.S.C. 405(a) for the Secretary to issue "reasonable" rules, and under the Due Process Clause of the Fifth Amendment (J.A. 16-18, 19, 23-24). Respondents also asserted that requiring claimants to pursue administrative appeals to the ALJ stage under Part A when inter-

mediaries were obliged to deny coverage on the basis of the 1979 instructions violated their right to prompt administrative action under 5 U.S.C. 555(b) and 706(2)(a) (J.A. 18-19). Finally, respondents contended that the Secretary violated the rulemaking provisions of the APA (5 U.S.C. 553) when the 1979 instructions and 1980 ruling were issued (J.A. 20-22).[6]

On February 18, 1981, the district court dismissed the complaint for lack of jurisdiction (Pet. App. 11a-17a). The district court found that "[t]he essence of [respondents'] claim * * * is a claim of entitlement to benefits for the BCBR procedure," and it held that such an action could not be brought under 42 U.S.C. 405(g) until the claimants had exhausted their administrative remedies (Pet. App. 14a). The district court explained that the exhaustion requirement is not discretionary with the court; that an appearance of futility does not render exhaustion unnecessary; and that exhaustion could not be regarded as futile in this case in any event because the Secretary's position concerning the reasonableness or efficacy of the BCBR procedure might change in the administrative hearings then being sought by respondents (*id.* at 14a-15a). The district court also held that exhaustion of administrative remedies could not be excused on the basis of respondents' argument that the Secretary should be collaterally estopped from "relitigating" the question of the coverage of BCBR under Medicare. The court explained that the Secretary had not yet ruled on the collateral estoppel argument in the pending administrative proceedings and that the application of collateral estoppel appeared doubtful because the Appeals Council

[6] Respondents also objected to the fact that Part A BCBR claims would be heard in the future by an ALJ other than the one who previously had considered the claims of Dr. Winter's patients (J.A. 22-23) and argued that the policy barring payment for BCBR constituted secretarial control over the practice of medicine in violation of 42 U.S.C. 1395 and unconstitutionally interfered with Dr. Winter's practice of medicine and his relationship with his patients (J.A. 19-20).

had stated in *In re Ferguson* that its ruling allowing payment for BCBR on behalf of the claimants in that case was not to have precedential effect (Pet. App. 14a-16a).

b. The court of appeals reversed the dismissal of the complaint and remanded for consideration of respondents' claims on the merits. The court of appeals recognized that under 42 U.S.C. 405(h) an action "to recover on a claim under the [Medicare] Act" can only be brought under 42 U.S.C. 405(g) and cannot be brought under 28 U.S.C. 1331 or 1361 (Pet. App. 3a-4a). But the court nevertheless held that the district court had jurisdiction under 28 U.S.C. 1331 and 1361 in this case. It found that a "major thrust" of respondents' complaint was that the Secretary's 1979 instructions and 1980 ruling barring reimbursement for BCBR constituted an "unlawful interference in the administrative process for determining benefits" (Pet. App. 5a, 3a). In the court's view, this is a "procedural" claim, not a substantive claim for benefits, and it concluded that to this extent the instant suit is not an action "to recover on [a] claim arising under" the Medicare Act for purposes of the jurisdictional bar in 42 U.S.C. 405(h) (Pet. App. 4a-6a).

The court of appeals acknowledged that respondents also contended that the Secretary had "reached an improper substantive result in the process of determining whether benefits should be awarded" (Pet. App. 6a) and that this contention did constitute a claim for benefits that had to be brought under 42 U.S.C. 405(g). It acknowledged as well that a district court has jurisdiction under 42 U.S.C. 405(g) only after the claimant has exhausted his administrative remedies (Pet. App. 6a). But the court of appeals found those requirements inapplicable in this case. It reasoned that the Secretary's issuance of the 1980 ruling requiring ALJs and the Appeals Council to deny claims for BCBR operations "indicated that [the Secretary] has no interest in appeals" (*id.* at 8a-9a) and that respondents' interest in having an initial benefit determination made "without the prejudice—and the neces-

sary appeal—resulting from the HCFA ruling" justified immediate judicial review (*id.* at 9a-10a). The court did hold, however, that the district court was without jurisdiction over the claims of individuals, such as respondent Ringer, who had not yet even applied for Medicare benefits for BCBR (*id.* at 9a n.4).

c. Although the court of appeals did not mention the point, the three respondents who had had BCBR surgery before the amended complaint was filed in this case—respondents Holmes, Webster-Zieber, and Vescio—in fact received a decision by an ALJ on their claims well before the court of appeals issued its opinion. See *In re Winter*, *supra*. The ALJ dismissed the claims of respondents Holmes and Webster-Zieber and 34 other beneficiaries without reaching the merits because Dr. Winter, as their representative, had not requested an ALJ hearing within 60 days of the decision on HCFA's reconsideration of their claims, as required by HHS regulations (slip op. 4-7; see 42 C.F.R. 405.722). The ALJ did reach the merits of the claims of respondent Vescio and 44 other beneficiaries who had had BCBR surgery before the October 28, 1980 effective date of the formal HCFA ruling.[7] However, after reviewing the extensive medical testimony and other evidence in the record (slip op. 16-33), the ALJ concluded that BCBR was not a "reasonable and necessary" procedure for those 45 claimants (slip op. 8-9, 35-44). The ALJ also rejected the claimants' argument that the Secretary was precluded by the doctrine of collateral estoppel from relitigating the BCBR coverage question by virtue of the Appeals Council's decision in *In re Ferguson*. The ALJ explained that the doctrine of preclusion was inapplicable because the Appeals Council had explicitly stated in *In re Ferguson* that its decision was not to be regarded as definitive on the

[7] The ALJ held that payment was barred under the 1980 HCFA ruling for BCBR surgery performed after October 28, 1980 (*In re Winter*, *supra*, slip op. 1-4, 34-35, 43).

issues raised and was not to be cited as precedent (*In re Winter, supra*, slip op. 15).

These and other BCBR cases have now been taken to the Appeals Council, but the Appeals Council has not yet rendered a decision on them.[8]

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision of the court of appeals is flatly inconsistent with this Court's decision in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), which clearly delineates the statutorily prescribed limitations on the jurisdiction of federal district courts over claims arising under the Social Security Act. *Salfi* and its progeny require the courts to respect the terms of the special administrative and judicial review procedures carefully structured by Congress and the Secretary to assure fair, thorough, and efficient consideration of the millions of claims filed each year under the various titles of the Act.[9]

A. Under *Salfi*, by virtue of the preclusion of review in 42 U.S.C. 405(h), judicial actions seeking to establish an entitlement to payments under the Social Security Act or to remove a legal barrier to the recovery of such payments in subsequent administrative proceedings cannot be brought under 28 U.S.C. 1331. They may be brought only pursuant to whatever statutory review pro-

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[8] After the court of appeals rendered its decision in this case, counsel for the claimants in the administrative proceedings (who is also counsel for respondents herein) requested the Appeals Council to stay its consideration of the administrative appeals from the ALJ's decision pending a decision by the district court on remand. The Appeals Council initially granted that request. Pet. 22 n.18. However, in response to a February 17, 1983 letter from the Administrator of HCFA (and despite a renewed request for a stay by respondents' counsel in a letter dated April 12, 1983), the Appeals Council has informed counsel by letter dated July 22, 1983 that it now intends to proceed with its consideration of the appeals.

[9] This Court has had occasion to note the enormous caseload under various Social Security programs, observing that there were 158 million claims for benefits filed under Part B of the Medicare Program in 1980 (*Schweiker* v. *McClure, supra*, 456 U.S. at 190)

visions Congress has made applicable in the Social Security Act itself, such as 42 U.S.C. 1395ff(b) and 405(g) in the case of individual Medicare Part A beneficiaries and 42 U.S.C. (& Supp. V) 1395*oo* in the case of Medicare providers. See 422 U.S. at 756-764. The effect of this statutory scheme is simply to channel *all* issues bearing on a particular claimant's entitlement to benefits—whether those issues are constitutional, statutory, regulatory, procedural, or evidentiary in nature—through the special administrative and judicial review procedures established under the Social Security Act. See also *Mathews v. Eldridge*, 424 U.S. 319, 327 (1976). The court of appeals' holding that the district court had jurisdiction under 28 U.S.C. 1331 over respondents' challenge to the denial of payment for BCBR ignores these limitations.

Although the court of appeals attempted to avoid the force of *Salfi* by characterizing respondents' claim as a "procedural" challenge to the "presumption" against payment for BCBR created by the 1979 instructions and 1980 ruling, this claim is essentially identical to that held in *Salfi* itself to be subject to the jurisdictional bar in Section 405(h). Nor can *Salfi* be distinguished on the ground that respondents seek only declaratory and injunctive relief, not an award of benefits. The plaintiffs in *Salfi* sought similar relief, but the Court held that jurisdiction under 28 U.S.C. 1331 was barred.

The enactment of the Administrative Procedure Act reinforces this construction of Section 405(h). Under 5 U.S.C. 703, the appropriate proceeding in which to ob-

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and 2.3 million claims for disability benefits filed under Titles II and XVI of the Act in 1981 (*Heckler* v. *Campbell*, No. 81-1983 (May 16, 1983), slip op. 3 n.2). More recently, in 1982, there were 48 million claims filed under Part A of the Medicare Program (Bureau of Program Operations, Health Care Financing Administration, U.S. Dep't of Health and Human Services, *B.P.O. Part A, Intermediary Workload Report* (May 1983)) and 3.2 million claims filed under the old age and survivors insurance program established by Title II of the Act (Social Security Administration, U.S. Dep't of Health and Human Services, *1983 Annual Report To Congress* 43).

tain judicial review of agency action, including the issuance of a rule, is the special statutory review procedure relevant to the subject matter. In this case, the applicable statutory review procedure is contained in 42 U.S.C. 1395ff(b) and 405(g). The exemption in 5 U.S.C. 553(b) from APA rulemaking requirements for matters pertaining to "benefits"—by virtue of which Social Security beneficiaries do not even have a right to present their legal and factual objections to a rule to the *Secretary* outside of the context of an individual claim for benefits —also demonstrates that Congress did not intend to permit beneficiaries to raise such objections to a rule in a separate proceeding under 28 U.S.C. 1331 notwithstanding the explicit jurisdictional bar in 42 U.S.C. 405(h).

Nor can the congressional intent to channel all issues bearing on a Social Security claim through 42 U.S.C. 405(g) be evaded by bringing an action under the mandamus statute, 28 U.S.C. 1361. Mandamus relief would be inappropriate in this case in any event because respondents can obtain judicial review of their claims under the special statutory review provisions in the Social Security Act and because the Secretary manifestly does not owe a clear duty to respondents to make payments under Medicare for BCBR surgery or to rescind the BCBR instructions and ruling.

B. Even within the special framework of the Social Security Act, whenever Congress *has* authorized judicial review of a claim for benefits, it has done so only where the Secretary has rendered a "final decision" on the claim "after a hearing." 42 U.S.C. 405(g). See also 42 U.S.C. (& Supp. V) 1395ff(b) and 1395*oo*(f)(1). This assures that a court will become involved in considering benefit disputes only after they first have been reviewed administratively to the extent the Secretary deems necessary to assure a thorough and accurate assessment.

The Court stressed in *Salfi* that the "final decision" requirement in 42 U.S.C. 405(g) is a "statutorily specified jurisdictional prerequisite," not "simply a codification

of the judicially developed doctrine of exhaustion" (422 U.S. at 766). Accordingly, that requirement may not be dispensed with by a court on the basis of its own conclusion that further exhaustion of administrative remedies would be futile. *Ibid.* Indeed, the determination of when a decision is "final" for purposes of judicial review is "left to the *Secretary* to flesh out by regulation" (*ibid.*; emphasis added). Thus, not only is the Secretary authorized by 42 U.S.C. 405(a) and related provisions to adopt procedures for the administrative adjudication of Social Security claims; she is authorized by the same statutory provisions to specify such requirements for exhaustion of her administrative procedures "as [she] deems serve [her] own interests in effective and efficient administration." 422 U.S. at 766. See also *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 328-330.

The Secretary has exercised this authority by specifying in governing regulations that, with one narrow exception applicable in the case of constitutional challenges to the Act that are beyond the competence of the Secretary to decide, an administrative denial of a claim is deemed "final" for purposes of judicial review only after the claimant has pursued *all* steps in the administrative process. 42 C.F.R. 405.701(c), incorporating 20 C.F.R. 404.900(a)(5). These regulations, adopted pursuant to authority expressly delegated by Congress, must be sustained unless they exceed the Secretary's statutory authority or are arbitrary and capricious. *Heckler* v. *Campbell*, No. 81-1983 (May 16, 1983), slip op. 8. The regulations clearly are not invalid on either ground, yet the court of appeals in this case chose not to enforce the exhaustion requirement they embody. This the court had no authority to do.

In view of the vast number of claims presented annually under the Social Security Act, the Secretary necessarily must fashion administrative procedures and corresponding exhaustion requirements with the generality of cases in mind. Just as the rules of civil and appellate procedure and statutory finality requirements governing

judicial proceedings in federal courts must be respected in all cases to which they apply, so too the procedural rules and finality requirements designed to govern the *administrative* review of a broad range of Social Security claims must be uniformly enforced in individual cases, whether or not the beneficiary or the court believes them to be sound as applied in the circumstances of a particular case. Any other result would sacrifice the certainty and ease of application of governing principles that are critical to the efficient administration of the Social Security programs and would overburden the federal courts with extensive and protracted litigation on threshold questions of jurisdiction and exhaustion of administrative remedies in Social Security cases.

To be sure, the Court in *Mathews* v. *Eldridge* fashioned a limited exception to the requirement of full exhaustion in the case of an asserted constitutional right to a pretermination hearing. But the issue there was entirely collateral to the merits of the disability claim, and the alleged injury could not have been remedied by a retroactive award of benefits if its consideration by a court were postponed until after full exhaustion of administrative remedies. 424 U.S. at 330-332. Neither of these factors is present here. Respondents simply challenge on the merits the denial of payment for particular services under the Medicare Program. This is a routine reimbursement issue that presents no basis whatever for excusing respondents from complying with the applicable exhaustion regulations.

C. It is clear that the jurisdictional and exhaustion holdings of *Weinberger* v. *Salfi* and its progeny are fully applicable to respondents' Part A Medicare claims, because the preclusion of review provision in 42 U.S.C. 405(h) applies to Medicare cases "to the same extent" as it applies to Title II cases (see 42 U.S.C. 1395ii) and the judicial review provisions in 42 U.S.C. (& Supp. V) 1395ff(b) and 1395*oo* likewise require a "final decision" as a jurisdictional prerequisite. And as to respondents' Part B claims, this Court held in *United States* v. *Erika*,

Inc., *supra*, 456 U.S. 201, that Congress has foreclosed *all* judicial review under Part B of the Medicare Program, whether the carrier's denial of a claim is based on the facts of a particular case or on an administrative instruction of general applicability issued by the Secretary.[10]

As it turns out, moreover, this case vividly illustrates why the court of appeals should have enforced the established jurisdictional and exhaustion requirements. While this case was under submission to the court of appeals, an ALJ in HHS ruled on the claims of the only three respondents who had received BCBR surgery, and it did so *without regard* to the instructions and HCFA ruling that respondents attack in this suit. The ALJ also considered the merits of the same collateral estoppel argument that respondents contend they should be permitted to present to a court without first pursuing their administrative remedies. It was precisely because of the possibility of such developments in administrative proceedings that the Court in *Salfi* foreclosed judicial review prior to a final decision by the Secretary.

The court of appeals' countenancing of a circumvention of the administrative process in these circumstances poses a serious threat to the Secretary's ability to administer the Medicare and other Social Security programs in the efficient manner Congress intended. If affirmed by this Court, it inevitably would accelerate the recent proliferation of litigation in the lower courts on questions of jurisdiction and exhaustion under the Social Security Act that impelled us to request the Court to revisit these issues despite the seemingly clear holdings of its prior cases. These are very real concerns, because we have been informed by HHS that there are now pending at

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[10] In *Erika* itself, the carrier's denial of payments under Medicare was based in part on an instruction issued by the Secretary to Part B carriers. See *Erika, Inc.* v. *United States*, 634 F.2d 580, 590-591 (Ct. Cl. 1980); U.S. Br. at 14, *United States* v. *Erika, Inc.*, *supra* (No. 80-1594, 1980 Term). See also *Starnes* v. *Schweiker*, No. 82-1543 (4th Cir. Aug. 16, 1983), slip op. 10-11, discussed in note 18, *infra*.

least 25 Medicare cases and more than 55 other Social Security cases involving related jurisdictional issues, several of which are class actions that include thousands of claimants who have not exhausted their administrative remedies.[11] We therefore urge the Court to arrest the erosion of the principles established in *Weinberger* v. *Salfi* by reaffirming that the lower courts must strictly adhere to the preclusion of review and exhaustion provisions in 42 U.S.C. 405(g) and (h).

ARGUMENT

THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE DISTRICT COURT HAD JURISDICTION TO CONSIDER RESPONDENTS' CLAIMS UNDER THE MEDICARE PROGRAM

A. District Court Jurisdiction Over This Suit Under 28 U.S.C. 1331 And 1361 Is Barred By The Jurisdictional Preclusion In 42 U.S.C. 405(h)

1. The court of appeals' holding that respondents could bring an action under 28 U.S.C. 1331 to challenge the validity of the 1979 instructions and 1980 HCFA ruling barring payment for BCBR is flatly inconsistent with this Court's decision in *Weinberger* v. *Salfi*. The named plaintiffs in *Salfi* filed applications for benefits under Title II of the Social Security Act as the surviving wife and stepchild of a deceased wage earner. Their applications were denied at the initial determination and reconsideration levels on the ground that they did not have the requisite relationship with the deceased wage earner for nine months prior to his death, as required by the Act. See 422 U.S. at 753-754, 764-765. The plaintiffs then brought an action in federal district court under 28 U.S.C. 1331

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[11] See, *e.g.*, *Lopez* v. *Heckler*, Civ. No. 83-0697-WPE(T) (C.D. Cal. June 16, 1983), appeal pending, No. 83-6126 (9th Cir. filed Aug. 3, 1983), stay granted, No. A-145 (Sept. 9, 1983) (Rehnquist, Circuit Justice); *Morrison* v. *Heckler*, No. C82-888V (W.D. Wash. May 27, 1983); *Mental Health Ass'n of Minnesota* v. *Schweiker*, 554 F. Supp. 157 (D. Minn. 1982), appeal pending, No. 83-1263-MN (8th Cir. argued June 14, 1983). See also *Smith* v. *Schweiker*, 709 F.2d 777 (2d Cir. 1983).

contending that the statutory duration-of-relationship requirement was unconstitutional. 422 U.S. at 752-753. As relief, the plaintiffs sought a declaratory judgment that the relevant statutory provisions were unconstitutional, injunctive relief prohibiting the Secretary from denying benefits on the basis of those provisions, and the payment of benefits. The district court found jurisdiction under 28 U.S.C. 1331, held the statute unconstitutional, and granted the requested relief. 422 U.S. at 755-756. This Court held that jurisdiction over the suit under 28 U.S.C. 1331 was barred by the third sentence of 42 U.S.C. 405 (h), which provides: "'No action against the United States, the Secretary, or any officer or employee thereof shall be brought under [§ 1331 *et seq.*] of Title 28 to recover on any claim arising under [Title II of the Social Security Act].'" 422 U.S. at 756, quoting 42 U.S.C. (1970 ed.) 405(h) (brackets in the Court's opinion).[12]

The Court rejected the contention that the plaintiffs' action was not one to recover on a claim "arising under" the Social Security Act because it also arose under the Constitution. The Court reasoned that not only were plaintiffs seeking to recover Social Security benefits, but also it was the Social Security Act that provided both the standing and the substantive basis for the presentation of their constitutional contentions. 422 U.S. at 760-

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[12] As it appeared in the 1970 and previous editions of the United States Code, 42 U.S.C. 405(h) provided:

> The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

In the 1976 edition of Title 42, which has not been enacted into positive law, the phrase "sections 1331 or 1346 of title 28" was substituted for the reference in the third sentence to "section 41 of Title 28." See page 33, *infra*.

761. Thus, the Court concluded, the jurisdictional bar in the third sentence of Section 405(h) "extends to any 'action' seeking 'to recover on any [Social Security] claim'—irrespective of whether resort to judicial processes is necessitated by discretionary decisions by the Secretary or by his nondiscretionary application of allegedly unconstitutional statutory restrictions." 422 U.S. at 762, quoting 42 U.S.C. 405(h) (brackets in the Court's opinion). The Court explained that the effect of 42 U.S.C. 405(h) in *Salfi* was simply to require that the plaintiffs' constitutional challenge be brought under the special jurisdictional grant in the Social Security Act, "and thus in conformity with the same standards which are applicable to nonconstitutional claims arising under the Act. The result is not only of unquestionable constitutionality, but it also is manifestly reasonable, since it assures the Secretary the opportunity prior to constitutional litigation to ascertain, for example, that the particular claims involved are neither invalid for other reasons nor allowable under other provisions of the Social Security Act." 422 U.S. at 762.

By virtue of 42 U.S.C. 1395ii, Section 405(h) applies to the Medicare Act "to the same extent" as it applies to Title II of the Social Security Act. The decision in *Salfi* therefore controls here. If Section 405(h) precludes jurisdiction under 28 U.S.C. 1331 even over a suit challenging a *statutory prohibition* barring the payment of benefits in a certain category of cases, as the Court held in *Salfi*, a fortiori Section 405(h) must bar federal question jurisdiction over a suit challenging the validity of an *administrative ruling* issued by the Secretary pursuant to the statute that also prohibits the payment of benefits in a certain category of cases.[13] A challenge to

[13] It is instructive in this regard that even the dissenting opinion in *Salfi* repeatedly stressed that a suit that does not challenge the constitutionality of the Social Security Act itself but simply asserts that the individual has certain rights under the Act, as respondents contend here, must be brought pursuant to 42 U.S.C. 405(g), after exhaustion of administrative remedies. 422 U.S. at

such a ruling on the ground that it was issued in violation of the Social Security Act is indisputably a claim "arising under" that Act within the meaning of Section 405(h). To paraphrase the language of *Salfi* (422 U.S. at 762, quoted at page 22, *supra*), Section 405(h) bars jurisdiction under 28 U.S.C. 1331 irrespective of whether resort to judicial processes is necessitated by the discretionary decision of an intermediary, an ALJ, or the Appeals Council denying benefits because the medical procedure was found not to be reasonable and necessary on the basis of evidence received in the particular case, or by their nondiscretionary application of an allegedly unlawful ruling of general applicability issued by the Secretary barring payment on the same grounds. See *Association of American Medical Colleges* v. *Califano*, 569 F.2d 101, 107 (D.C. Cir. 1977).

2. The court of appeals attempted to avoid the preclusive effect of 42 U.S.C. 405(h) by characterizing respondents' claim as "procedural" in nature rather than a substantive claim for benefits—*i.e.*, as a challenge to the Secretary's assertedly "unlawful interference" in the administrative adjudication of individual cases (Pet. App. 3a) by adopting a "presumptive rule" that BCBR is not a reasonable and necessary service covered by Medicare (*id.* at 5a). The court reasoned that Section 405(h) is to be given a "relatively narrow scope" (Pet. App. 4a) and should not be read to bar jurisdiction under 28 U.S.C. 1331 to entertain such "procedural" claims (Pet. App. 4a-6a). This reasoning, too, flies in the face of *Salfi*.

The Court observed in *Salfi* that the third sentence of Section 405(h) is "sweeping and direct" and stressed that it is *not* to be construed narrowly. 422 U.S. at 757. See *Attorney Registration and Disciplinary Comm'n* v.

789-790, 791-793 & nn.6 & 8, 795, 797 (Brennan, J., dissenting). The dissenting opinion disagreed with the majority's holding that the third sentence of Section 405(h) also bars constitutional attacks on the statute itself under 28 U.S.C. 1331. 422 U.S. at 789-797.

Schweiker, No. 83-1132 (7th Cir. Aug. 11, 1983), slip op. 5; *Association of American Medical Colleges* v. *Califano*, *supra*, 569 F.2d at 106. Moreover, what the court of appeals in this case characterized as a "procedural" claim outside the scope of the jurisdictional bar in Section 405(h) is essentially identical for present purposes to the claim found in *Salfi* itself to fall squarely within the scope of that bar. The plaintiffs in *Salfi* challenged the duration-of-relationship prerequisite to the receipt of survivors benefits on the similar ground that it created an impermissible "irrebuttable presumption" [14] that a relationship of less than nine months' duration was a sham; the plaintiffs there, like respondents here, contended that they instead should be given an opportunity to have the relevant issue decided on a case-by-case basis in the course of administrative proceedings on their individual claims. See 422 U.S. at 753, 767-768, 770-772, 782-785. The holding in *Salfi* foreclosing jurisdiction under 28 U.S.C. 1331 therefore applies equally here, irrespective of the "procedural" label respondents and the court of appeals attach to the issue.

Although it is not directly relevant to the jurisdictional issues involved in this case, we also note that the Court's recent decision in *Heckler* v. *Campbell* sustaining the Secretary's disability grid regulations demonstrates that the Secretary does *not* impermissibly interfere with the adjudication of individual cases by adopting rules of general applicability to resolve "certain classes of issues" (slip op. 9). The Secretary's promulgation of rules and instructions for this purpose under the Medicare Program is authorized not only by 42 U.S.C. 405(a), relied upon by the Court in *Heckler* v. *Campbell*, *supra*, slip op. 7-8, but also by 42 U.S.C. 1395ff(a), which expressly provides for the Secretary to determine Part A Medicare claims "in accordance with regulations prescribed by [her]."

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[14] See 422 U.S. at 753 and 770-772, citing *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974); *Vlandis* v. *Kline*, 412 U.S. 441 (1973); and *Stanley* v. *Illinois*, 405 U.S. 645 (1972).

Such rules must be sustained unless shown to be arbitrary and capricious. *Heckler* v. *Campbell*, *supra*, slip op. 7-8. The Secretary's determinations with respect to BCBR—based on relevant data and other available scientific material, the expert advice of special advisory groups, and the fact that the procedure is not generally accepted by the medical profession as safe and effective—clearly are not invalid under this standard. They also are well suited to resolution in the context of a rule of general applicability rather than case-by-case adjudication. Compare *Heckler* v. *Campbell*, *supra*, slip op. 9-10.

The merits of the Secretary's BCBR ruling to one side, however, even if respondents' challenge were correctly characterized as "procedural," there is another reason why this characterization would not remove it from the bar in Section 405(h) to federal question jurisdiction. The issue involved in *Mathews* v. *Eldridge*—whether the plaintiffs were entitled to a hearing prior to the termination of their disability benefits—manifestly was "procedural" in nature, and yet the Court made clear that an action presenting that issue under 28 U.S.C. 1331 would be barred by Section 405(h) and instead had to be brought pursuant to 42 U.S.C. 405(g). 424 U.S. at 327. See *Califano* v. *Sanders*, 430 U.S. 99, 109 (1977); cf. *Ellis* v. *Blum*, 643 F.2d 68, 77-78 (2d Cir. 1981). See also *Califano* v. *Yamasaki*, 442 U.S. 682, 697-698 (1979).

3. Respondents also seek to distinguish *Salfi* by asserting (Br. in Opp. 19-21) that the plaintiffs there sought an award of benefits, while in this case respondents seek only a declaratory judgment and injunction preventing the Secretary from enforcing the BCBR rulings, leaving the actual award of benefits to further administrative proceedings. Contrary to respondents' contention, however, the "sweeping and direct" bar in Section 405(h) to jurisdiction under 28 U.S.C. 1331 cannot be so transparently evaded. *Salfi* itself establishes as much. In addition to seeking an award of benefits, the plaintiffs in *Salfi* sought a declaratory judgment that the statutory provisions were unconstitutional and injunctive

relief prohibiting the Secretary from relying on those provisions to deny benefits in administrative proceedings (App. at 12-13, *Weinberger* v. *Salfi*, *supra* (No. 74-214, 1974 Term)); but the Court did not find jurisdiction under 28 U.S.C. 1331 for those aspects of the plaintiffs' suit either.[15]

It necessarily follows from *Salfi* that respondents in this case cannot split off one of the legal arguments in support of their claims for benefits (*i.e.*, that HCFA's intermediary instructions and BCBR ruling are invalid) and present that argument in a separate action under 28 U.S.C. 1331, with the intent of subsequently pursuing their administrative remedies armed with a judicial holding on the validity of the BCBR rulings.[16] The "final decision" after completion of administrative proceedings, if adverse to the claimant, would be subject to judicial review under 42 U.S.C. 405(g), thereby initiating a *second* round of proceedings in court on the same benefits claim. And under respondents' view, this course would be available in *any* case in which a regulation or instruction issued by HHS may have some bearing on a benefit claim.[17] To permit claimants to pursue such a

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[15] The dissenting opinion in *Salfi* in fact argued that even if an award of benefits in a suit under 28 U.S.C. 1331 is barred by Section 405(h), a suit under 28 U.S.C. 1331 should not be barred if it sought only declaratory and injunctive relief requiring the Secretary to ignore the statutory duration-of-relationship requirement in subsequent administrative proceedings on individual benefit claims. But the dissent nevertheless understood the majority to have held otherwise. See 422 U.S. at 788-789, 797-799 & n.13 (Brennan, J., dissenting).

[16] As noted above (see note 8, *supra*), counsel for respondents requested the Appeals Council to stay administrative proceedings pending a decision by the district court on that issue.

[17] Under respondents' view, for example, the challenge to the grid regulations involved in *Heckler* v. *Campbell* also could have been brought under 28 U.S.C. 1331—rather than pursuant to 42 U.S.C. 405(g) after full exhaustion of administrative remedies, as actually occurred (slip op. 4-5)—if the plaintiff did not seek an actual award of benefits and purported only to challenge the "procedure" by which the Secretary decided an issue in a disability case by refer-

course would substantially disrupt the efficient administration of the various titles of the Social Security Act and would result in the waste and duplication of scarce administrative and judicial resources.

For the foregoing reasons, *all* issues bearing on a claimant's entitlement to payments under the Social Security Act must be channeled through whatever special review procedures Congress and the Secretary have established under that Act. Other courts of appeals have adhered to this view. They have recognized that when a claimant brings an action seeking to clear the way to receipt of benefits under the Social Security Act in the future by urging the court to invalidate an administrative regulation or interpretation of the Act that serves to limit or bar an award in administrative proceedings, the action falls within the scope of the jurisdictional bar in 42 U.S.C. 405(h) and therefore cannot be brought under 28 U.S.C. 1331. See *V.N.A. of Greater Tift County, Inc.* v. *Heckler*, 711 F.2d 1020, 1024-1027 (11th Cir. 1983); *Attorney Registration and Disciplinary Comm'n* v. *Schweiker*, *supra*, slip op. 5-6; *Hadley Memorial Hospital, Inc.* v. *Schweiker*, 689 F.2d 905, 908-910 (10th Cir. 1982); *Hopewell Nursing Home, Inc.* v. *Schweiker*, 666 F.2d 34, 39-40 (4th Cir. 1981)[18]; *Humana of South*

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ence to general regulations. Such an approach would have forced the Court to review the grid regulations in the abstract, without a full appreciation of the manner in which they would be applied in a particular case.

[18] Although the Fourth Circuit adhered to this view in *Hopewell Nursing Home*, cited in the text, its recent decision in *Starnes* v. *Schweiker*, No. 82-1543 (Aug. 16, 1983), takes a conflicting position. The latter case was brought by Medicare Part B beneficiaries and physicians who furnished services challenging instructions issued to Part B carriers that limited the amount of reimbursement for a particular service. They contended, *inter alia*, that the instructions were not consistent with the statute and were not promulgated in accordance with the rulemaking provisions of the APA. The court of appeals held that, under this Court's decision in *Erika*, the district court did not have jurisdiction over the case insofar as the plaintiffs sought review of decisions by Part B carriers on *past* claims. *Starnes*, *supra*, slip op. 10-11. However, the court held that

Carolina, Inc. v. *Califano*, 590 F.2d 1070, 1079 (D.C. Cir. 1978);[19] *Rhode Island Hospital* v. *Califano*, 585 F.2d

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neither *Erika* nor 42 U.S.C. 405(h) bars a suit brought under 28 U.S.C. 1331 to prevent carriers and the Secretary from applying the instructions in the future. Slip op. 11-17.

This decision is clearly wrong, for two separate reasons. First, it permits Part B beneficiaries to avoid the holding in *Erika* simply by filing a suit in federal district court prior to receiving a final decision on a reimbursement claim from the carrier, thereby substantially undermining the congressional intent to keep Part B disputes out of the courts. Second, and more generally, it permits a claimant to avoid the explicit jurisdictional bar in 42 U.S.C. 405(h) simply by omitting a request for monetary relief, despite the Fourth Circuit's acknowledgment (*Starnes*, *supra*, slip op. 17) that the plaintiffs there sought judicial invalidation of the instruction in order to pave the way to greater reimbursement in administrative proceedings.

The Fourth Circuit appears to have been influenced in part by the fact that carrier decisions on individual claims are not subject to judicial review under Part B, thereby foreclosing all review of the Secretary's instructions unless the court was able to find jurisdiction under some other provision, such as 28 U.S.C. 1331. See *Starnes*, *supra*, slip op. 14, 16-17. To the extent this was the court's rationale, it has no application here, because the Medicare beneficiary respondents in this case have a right of judicial review under 42 U.S.C. 405(g) if the Secretary ultimately denies their Part A claims. In any event, and contrary to the Fourth Circuit's view, preclusion of judicial supervision of the Secretary's administration of the Part B Medicare Program— involving more than 150 million claims annually—is *precisely* what Congress intended (except, perhaps, in the case of certain constitutional issues, cf. *Schweiker* v. *McClure*, 456 U.S. 188 (1982)). The Fourth Circuit, understandably, was not confident about the result it reached, for it stated that it regarded the question as a "close" one and that a "higher reviewing court" might be of the opinion that it had misconstrued Section 405(h) and the decision in *Erika* (*Starnes*, *supra*, slip op. 18).

[19] In *Humana*, the D.C. Circuit did hold that an objection to the Secretary's failure to follow the notice and comment procedures of the Administrative Procedure Act before promulgating a rule could be brought under 28 U.S.C. 1331, even though a substantive challenge to the validity of the rule could not. 590 F.2d at 1079-1082. This distinction between substantive and procedural challenges to the validity of a single regulation that may have a bearing on a reimbursement issue finds no support in the Act or common sense. As we explain below (see pages 30-32, *infra*), federal question jurisdiction over procedural APA claims also is barred by Section 405(h).

1153, 1158 (1st Cir. 1978); *Dr. John T. MacDonald Foundation, Inc.* v. *Califano*, 571 F.2d 328, 331-332 (5th Cir.) (en banc), cert. denied, 439 U.S. 893 (1978). See also *National Ass'n of Home Health Agencies* v. *Schweiker*, 690 F.2d 932, 938 (D.C. Cir. 1982), cert. denied, No. 82-991 (Feb. 22, 1983); *Association of American Medical Colleges* v. *Califano*, *supra*, 569 F.2d at 106-108.

4.a. There is an additional reason why the statutory scheme cannot be read to embody a congressional intent to permit judicial challenges to regulations and instructions issued by the Secretary to be brought in a separate action under 28 U.S.C. 1331, notwithstanding the explicit jurisdictional bar in 42 U.S.C. 405(h). Not long after Section 405(h) was passed in 1939, Congress enacted the Administrative Procedure Act in 1946 to provide, *inter alia*, for participation by members of the public in the development of rules by federal agencies. Act of June 11, 1946, ch. 324, 60 Stat. 237 *et seq.* Section 4 of that Act (60 Stat. 238), the substance of which is now codified at 5 U.S.C. 553, requires agencies to provide notice of proposed rulemaking and to give interested persons "an opportunity to participate in the rule making through submission of written data, views, or arguments." These requirements ensure the public the right to bring their factual and legal objections to a rule to the attention of the agency in an effort to have the proposal modified or set aside administratively.

Significantly, however, Congress expressly exempted from the notice-and-comment requirements of the APA "any matter relating to * * * benefits" (60 Stat. 238; 5 U.S.C. 553(a)(2)) — a provision that clearly was understood to apply to Social Security programs. See *Attorney General's Manual on the Administrative Procedure Act* 27 (1947); *Humana of South Carolina, Inc.* v. *Califano*, *supra*, 590 F.2d at 1082-1084. This exemption was included because Congress believed that "the principal considerations in most such cases relate to mechanics and interpretations of policy, and it is deemed wise to

encourage and facilitate the issuance of rules by dispensing with all mandatory procedural requirements." S. Rep. No. 752, 79th Cong., 1st Sess. 13 (1945); see also H.R. Rep. No. 1980, 79th Cong., 2d Sess. 23 (1946).

It is inconceivable that, although Congress did not even confer on Social Security beneficiaries a right to present the *Secretary* with their factual and legal objections to a rule, it nevertheless implicitly furnished those beneficiaries with a right to invoke the judicial process in a separate action under 28 U.S.C 1331 to raise those objections, notwithstanding the explicit jurisdictional bar in 42 U.S.C. 405(h). The enactment of the APA therefore strongly reinforces the conclusion that challenges to the validity of rulings and instructions issued under the Social Security Act must first be presented in administrative proceedings in connection with the individual's claim for benefits and may be raised on judicial review only under 42 U.S.C. 405(g) in the event that the Secretary ultimately denies a claim for benefits on the basis of the rulings and instructions. As in *Salfi*, the result is simply to channel all objections to the denial of benefits through the special statutory review procedure Congress has established. The APA reinforces this conclusion in another respect as well, for it provides that the form of proceeding for judicial review of agency action, which includes the issuance of rules, is the special statutory review proceeding relevant to the subject matter (5 U.S.C. 703)—in this case, 42 U.S.C. 405(g) and 1395ff(b), which permit a claimant to challenge a rule in connection with his claim for benefits.

b. In view of the express statutory exemption from APA rulemaking procedures for matters relating to "benefits," it would seem to be especially clear that 42 U.S.C. 405(h) bars jurisdiction under 28 U.S.C. 1331 over a challenge to the Secretary's failure to follow notice-and comment procedures when issuing rules and instructions under the Social Security Act. Yet respondents raised such a claim in district court (J.A. 20-22), and, quite surprisingly, a number of courts actually have held that

jurisdiction over such an "APA" rulemaking claim does lie under 28 U.S.C. 1331.[20] We submit, however, that it is perverse for these courts to conclude that a challenge to a Social Security regulation on the ground that it violates the Social Security Act or even the Constitution (which clearly *do* impose limits on the Secretary's authority) nevertheless must be channeled through 42 U.S.C. 405(g), but that a challenge to a regulation on the ground that it was not issued in conformity with the rulemaking provisions of the APA (which do *not* apply to Social Security benefit programs) may be brought wholly outside this special statutory scheme. See, *e.g.*, *Humana of South Carolina, Inc.* v. *Califano*, *supra*, 590 F.2d at 1082-1084. Other courts have properly rejected this position.[12]

In 1970, the Secretary did issue a memorandum to all components of the Department directing them, as a matter of policy, to follow notice-and-comment procedures when issuing rules in areas that fall within the APA exemption for matters relating to benefits. This memorandum subsequently was published in the *Federal Register*. 36 Fed. Reg. 2532 (1971). See also 47 Fed. Reg. 26860 (1982). The courts seem to have assumed that simply by virtue of publication, this memorandum attained the force of law and created rights enforceable by private parties in court.[22] But in fact it does not appear that the memorandum and accompanying announcement ever were intended to be more than their terms suggest: a statement of internal policy. See *Independent Meat Packers Ass'n*

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[20] See, *e.g.*, *Starnes* v. *Schweiker*, *supra*, slip op. 15-17; *National Ass'n of Home Health Agencies* v. *Schweiker*, *supra*, 690 F.2d at 936-937; *Humana of South Carolina, Inc.* v. *Califano*, *supra*, 590 F.2d at 1080-1081; *Daniel Freeman Memorial Hospital* v. *Schweiker*, 656 F.2d 473, 476 (9th Cir. 1981).

[21] *Hadley Memorial Hospital, Inc.* v. *Schweiker*, *supra*, 689 F.2d at 910-912; *American Ass'n of Councils of Medical Staffs* v. *Califano*, 575 F.2d 1367, 1370-1373 (5th Cir. 1978).

[22] *Humana of South Carolina, Inc.* v. *Califano*, *supra*, 590 F.2d at 1084 & n.102. See *Rodway* v. *Department of Agriculture*, 514 F.2d 809, 814 (D.C. Cir. 1975).

v. *Butz*, 526 F.2d 228, 235-236 (8th Cir. 1975). Cf. *United States* v. *Caceres*, 440 U.S. 741, 754 n.18 (1979).[23]

However that may be, the publication of the policy statement in 1971 clearly did not make the rulemaking provisions of the APA applicable in their own right to Social Security programs. The statutory exemption Congress enacted remains in effect, and as a result, the APA rulemaking provisions do not furnish an independent basis for a court to invalidate the instructions and HCFA ruling respondents challenge. Compare *United States* v. *Caceres*, *supra*, 440 U.S. at 753-754. The Secretary's authority to direct that notice-and-comment rulemaking be followed in Social Security benefit programs instead derives from her authority under 42 U.S.C. 405(a) and related provisions to promulgate rules and regulations for the administration of the Social Security Act. Any rights conferred on respondents by the 1971 publication of the policy statement regarding notice-and-comment procedures therefore are ones "arising under" the Social Security Act itself, in the same manner as their substantive claims for benefits. It necessarily follows that because of the jurisdictional bar in 42 U.S.C. 405(h), respondents cannot bring an action under 28 U.S.C. 1331 to raise the notice-and-comment issue. They may raise that claim only on judicial review of a denial of benefits under 42 U.S.C. 405(g). This conclusion is eminently reasonable, for it gives the Secretary the opportunity in administrative proceedings to determine the effect of a failure to follow her own policy directive, just as she may interpret and apply substantive regulations in administrative proceedings on a claim for benefits.

5. In addition to finding federal question jurisdiction under 28 U.S.C. 1331, the court of appeals held that the district court had mandamus jurisdiction under 28 U.S.C.

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[23] In May 1982, the Secretary proposed a regulation to clarify that the Department's policy of following notice-and-comment procedures is internal only and not judicially enforceable. 47 Fed. Reg. 26860-26861.

1361 to entertain respondents' "procedural" claim (Pet. App. 10a). In *Califano* v. *Yamasaki* and *Mathews* v. *Eldridge*, this Court found it unnecessary to determine whether 42 U.S.C. 405(h) entirely bars mandamus jurisdiction under 28 U.S.C. 1361 over any action arising under the Social Security Act, because jurisdiction over the prerecoupment and pretermination hearing issues in those cases was found under 42 U.S.C. 405(g). See 442 U.S. at 698; 424 U.S. at 332 n.12. See also *Norton* v. *Mathews*, 427 U.S. 524, 529-530 (1976). In our view, however, the exercise of mandamus jurisdiction in this case was clearly barred by 42 U.S.C. 405(h). Indeed, in *Salfi* itself, the plaintiffs asserted in district court that jurisdiction over the essentially identical "procedural" objection to an irrebuttable presumption against eligibility rested on 28 U.S.C. 1361 as well as 28 U.S.C. 1331 (App. at 7, *Weinberger* v. *Salfi*, *supra* (No. 74-214, 1974 Term)), and yet the Court held that the action had to be brought under 42 U.S.C. 405(g) because it was one seeking to recover on a claim arising under the Social Security Act.

The third sentence of Section 205(h) of the Social Security Act (42 U.S.C. 405(h)), as originally enacted, provided that an action may not be brought under Section 41 of Title 28 of the United States Code to recover on a claim arising under Title II of the Act. See note 12, *supra*. As the Court explained in *Weinberger* v. *Salfi* (422 U.S. at 756 n.3), at that time Section 41 of Title 28 contained all of that Title's grants of jurisdiction to federal district courts, except for special purpose jurisdictional statutes of no relevance to Social Security cases. The mandamus statute was not then in force and was not enacted until 1962. Pub. L. No. 87-748, Section 1(a), 76 Stat. 744.[24] It nevertheless would be consistent with the

[24] The express reference in the 1976 edition of 42 U.S.C. 405(h) to 28 U.S.C. 1331 and 1346 was substituted for the reference to Section 41 of Title 28 by the codifiers (see 42 U.S.C. 405 note, at 518), whose "choice, 'made * * * without the approval of Congress * * * should be given no weight.'" *North Dakota* v. *United States*, No. 81-773 (Mar. 7, 1983), slip op. 10 n.13, quoting *United States* v. *Welden*, 377 U.S. 95, 99 n.4 (1964).

"sweeping" language of the third sentence of Section 405(h) (see *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 757) to interpret it as barring jurisdiction under the mandamus statute whenever jurisdiction over the particular suit under 28 U.S.C. 1331 also would be barred. A contrary holding would permit circumvention of the clear congressional purpose expressed in 42 U.S.C. 405(g) and (h) to bar judicial review of decisions of the Secretary in administering the Social Security Act except as provided in that Act itself, and thereby to channel all judicial review through 42 U.S.C. 405(g).

In addition, even if the third sentence of Section 405(h) does not foreclose mandamus jurisdiction in all Social Security cases, the exercise of that jurisdiction would in any event be barred in this case by the second sentence of Section 405(h). The second sentence provides that "[n]o findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided." Respondents challenge on the merits the non-final decisions of the Secretary denying their claims for payment for BCBR surgery. Under the second sentence of Section 405(h), it is clear that the Secretary's decision on the merits of a claim for benefits cannot be reviewed by any "tribunal" (including a district court) except as "herein provided"—*i.e.*, pursuant to 42 U.S.C. 1395ff(b) and 405(g), after full exhaustion of administrative remedies. This principle is fully applicable where, as here, the Secretary's decision denying coverage is based on a regulation barring payment. Even the Second Circuit, which has held that mandamus jurisdiction is not entirely foreclosed by Section 405(h), has stated that such jurisdiction is available only to consider "otherwise unreviewable procedural issues not related to merits of a claim for benefits." *Dietsch* v. *Schweiker*, 700 F.2d 865, 868 (2d Cir. 1983). See also *Ellis* v. *Blum*, 643 F.2d 68, 82 (2d Cir. 1981); *White* v. *Mathews*, 559 F.2d 852, 856 (2d Cir. 1977), cert. denied, 435 U.S. 908 (1978). In this case, not only are the procedural issues respondents seek to raise directly related to the merits of their claims for benefits;

they also are reviewable in an action under 42 U.S.C. 405(g).

In any event, well established limitations on the exercise of mandamus jurisdiction make clear that such relief is not available here. Mandamus would lie only if there were no other adequate remedy available and the Secretary owed the plaintiffs a clear duty. *United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U.S. 540, 543-544 (1937). See *Leschniok* v. *Heckler*, No. 82-5676 (9th Cir. Aug. 18, 1983), slip op. 4;[25] *Hadley Memorial Hospital, Inc.* v. *Schweiker*, *supra*, 689 F.2d at 912; *American Healthcare Corp.* v. *Schweiker*, 688 F.2d 1072, 1084 (7th Cir. 1982); *Herzog* v. *Secretary of HEW*, 686 F.2d 1154, 1161 n.5 (6th Cir. 1982); *Cervoni* v. *Secretary of HEW*, 581 F.2d 1010, 1020 (1st Cir. 1978); *Association of American Medical Colleges* v. *Califano*, *supra*, 569 F.2d at 110 n.80. See generally 1 J. Moore, *Moore's Federal Practice* ¶ 0.62[17] (2d ed. 1982). Neither requirement is satisfied in this case.

As we have explained, respondents have a fully adequate remedy under 42 U.S.C. 1395ff(b) and 405(g) to challenge the Secretary's decision denying payment for BCBR, including any objections to the 1979 intermediary instructions and 1980 ruling if either should ultimately play a role in the Secretary's final decision. Claimants under the Social Security Act cannot avoid the requirement of exhaustion of remedies under these sections simply by bringing a challenge to a regulation under the

[25] The court in *Leschniok* appeared to hold, however, that mandamus jurisdiction *would* be available, without regard to the usual exhaustion requirements, in any case raising a constitutional issue that does not directly seek the payment of benefits; and the court then held that an allegation that the Secretary failed to follow the statute amounts to an allegation of a constitutional violation, because such conduct contravenes the President's duty to take care "that the Laws be faithfully executed" (U.S. Const. Art. II, § 3). Slip op. 9. The effect of this decision converting statutory issues into constitutional ones, if followed, would be to make mandamus jurisdiction immediately available in any case in which the claimant alleges that the Secretary misapplied the statute. We must assume that the Ninth Circuit did not intend to fashion such a massive loophole in the Social Security jurisdictional scheme.

mandamus statute. Moreover, the determination whether BCBR is a reasonable and necessary medical service involves questions of judgment and discretion and the weighing of available data and other evidence. In these circumstances, it scarcely can be said that the Secretary has a clear duty to make payment for BCBR or to rescind the ruling or instructions through which the Secretary has expressed her findings on the question of coverage. Indeed, the Second Circuit recently has expressed the view that mandamus will never lie to challenge the propriety of a regulation, as distinguished from the Secretary's conduct under it. *Smith* v. *Schweiker*, 709 F.2d 777, 779 (1983). These factors strongly reinforce the conclusion that a claimant cannot be permitted to circumvent the congressional policies embodied in 42 U.S.C. 405(g) and (h) and confirmed by this Court in *Salfi* by invoking the mandamus statute.

B. The District Court Did Not Have Jurisdiction Over This Case Under 42 U.S.C. 405(g) Because Respondents Did Not Exhaust Their Administrative Remedies And Obtain A "Final Decision" By The Secretary On Their Individual Benefit Claims

Despite the "procedural" label the court of appeals attached to their claim, it is clear that respondents simply have a substantive disagreement with the denial by the Secretary of claims for payments under Part A of the Medicare Program. Thus, at bottom, this case involves nothing more than a routine Medicare reimbursement dispute. Even the court of appeals acknowledged (Pet. App. 6a-7a) that judicial review of a decision by the Secretary (or by an intermediary acting on her behalf) denying a claim for benefits may be obtained only pursuant to 42 U.S.C. 405(g) after exhaustion of administrative remedies. Yet the court of appeals held that the district court had jurisdiction over respondents' claims under 42 U.S.C. 405(g) even though they had *not* exhausted their administrative remedies (Pet. App. 6a-10a). This holding, like the court's finding of jurisdiction under 28 U.S.C. 1331 notwithstanding the explicit jurisdictional bar in 42 U.S.C. 405(h),

is directly contrary to the statutory text and this Court's decisions.

1. The exhaustion requirement derives from the language in 42 U.S.C. 405(g) providing that judicial review is available under that Section only where there has been a "final decision" by the Secretary "after a hearing" on the claim for benefits. This explicit requirement is reiterated in the judicial review section of the Medicare Act, 42 U.S.C. 1395ff(b)(1)(C). See also 42 U.S.C. (Supp. V) 1395*oo*(f)(1).

Only three of the five respondents in this case—Holmes, Webster-Zieber and Vescio—ever even filed a claim for benefits under Medicare for BCBR surgery. This Court repeatedly has made clear that the filing of an application for benefits is an absolute jurisdictional prerequisite to bringing an action under 42 U.S.C. 405(g), because without such an application, there can be no "decision" whatever by the Secretary on the claim. See *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 764; *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 328-329; *Mathews* v. *Diaz*, 426 U.S. 67, 75 (1976); *Califano* v. *Yamasaki*, *supra*, 442 U.S. at 704; *Heckler* v. *Lopez*, No. A-145 (Sept. 9, 1983), slip op. 7 (Rehnquist, Circuit Justice); cf. *Schweiker* v. *Hansen*, 450 U.S. 785, 790 (1981). For this reason, as the court of appeals held (Pet. App. 9a n.4), the district court clearly had no jurisdiction under 42 U.S.C. 405(g) with respect to any matters pressed on behalf of respondent Ringer or other individuals who had not filed such an application.[26] Nor does respondent Win-

[26] As typically is the case in insurance programs generally, a claim may be filed under Medicare (thereby invoking the administrative process that must precede the right to judicial review under 42 U.S.C. 405(g)) only *after* the individual has been furnished the services for which payment is sought. See 42 U.S.C. (& Supp. V) 1395c, 1395d(a), 1395f(a), 1395ff(b) and 405(b); 42 C.F.R. 405.1662-405.1667. Congress obviously appreciated that the task of administering the Medicare Program would be burdensome enough with the processing of concrete claims for services already rendered, without also providing for a scheme by which an individual could obtain a declaratory ruling on whether certain services would be covered should the individual elect to obtain them in the future.

ter, the physician who performs the BCBR surgery, have any standing in his own right to bring an action under 42 U.S.C. 405(g) on the question of Medicare coverage for BCBR. See *Attorney Registration and Disciplinary Comm'n* v. *Schweiker*, *supra*, slip op. 7.

Although respondents Holmes, Webster-Zieber, and Vescio did submit applications for benefits under Part A before the amended complaint in this case was filed, none had pursued his administrative remedies beyond the reconsideration stage. A decision on reconsideration is not the Secretary's "final decision" for purposes of judicial review. As we have explained above, the question of what constitutes the requisite "final decision" for purposes of judicial review is "left to the Secretary to flesh out by regulation" (*Weinberger* v. *Salfi*, *supra*, 422 U.S. at 766), and the governing regulations explicitly provide that such a decision will have been rendered only after the claimant has completed all four steps of the administrative process, including ALJ and Appeals Council review. 42 C.F.R. 405.701(c), incorporating 20 C.F.R. 404.900(a)(5). Because respondents Holmes, Webster-Zieber, and Vescio had not completed the last two steps of the process when the amended complaint was filed (and even now have not received an Appeals Council decision), they failed to satisfy the "statutorily specified jurisdictional prerequisite" to bringing an action under 42 U.S.C. 405(g). *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 766.

2. The court of appeals excused respondents from satisfying the exhaustion requirement because it believed that "[b]y issuing a ruling that purports to bind ALJs and the Appeals Council to the denial of benefits for BCBR operations, the Secretary has indicated that [she] has no interest in appeals at or beyond the ALJ level" (Pet. App. 8a). The court of appeals was simply wrong. It confused a *substantive* rule pertaining to the merits of a claim with a *procedural* rule governing the manner in which a claim must be presented to the Secretary for decision. The 1980 HCFA ruling was the

former, and had no bearing on the exhaustion issue. Cf. *Heckler* v. *Lopez*, *supra*, slip op. 8 (Rehnquist, Circuit Justice) ("there is no decision of this Court that has interpreted the Secretary's announcement of her interpretation of a Social Security statute as a waiver of the exhaustion requirement"). When the Secretary has intended to permit a claimant to bypass the administrative process, she has explicitly so provided in her procedural rules. But she has not done so for respondents' claims.

The Court stressed in *Salfi* that "the Secretary may specify such requirements for exhaustion as [she] deems serve [her] own interests in effective and efficient administration" and that the statutory scheme therefore does not bar the *Secretary* from determining in certain circumstances that full internal exhaustion is not necessary in order for her to deem a decision denying benefits to be administratively "final" for purposes of judicial review. 422 U.S. at 766-767. In *Salfi* itself, the plaintiffs represented that the Secretary had correctly found the relevant facts regarding the duration of their relationship to the decreased wage earner; that they did not dispute his interpretation or application of the relevant statutory provisions to deny their claims; and that the only issue remaining was the constitutionality of those statutory provisions, a matter that was beyond the competence of the Secretary to decide. 422 U.S. at 765; App. at 11, *Weinberger* v. *Salfi*, *supra* (No. 74-214, 1974 Term). The Court held that the Secretary properly could determine in these circumstances that it was unnecessary to require the plaintiffs fully to exhaust their administrative remedies through the Appeals Council stage, because he had "determin[ed] in favor of the applicant, without a hearing, all issues with regard to eligibility save for one [the constitutional issue] as to which he considers a hearing to be useless." 422 U.S. at 767.

Following the decision in *Salfi*, the Secretary promulgated regulations establishing a procedure for expediting the right to judicial review in the circumstances identified in *Salfi*. This expedited procedure is available if the individual's claim has been denied at the reconsider-

ation level, if he does not dispute the Secretary's findings of fact or interpretation or application of controlling law, and if the claimant alleges (and the Secretary agrees) that the only factor precluding a favorable determination is a statutory provision that the claimant contends is unconstitutional. In such a situation, the claimant and a representative of the Secretary may enter into a formal agreement stipulating to the existence of these conditions and deeming the decision on reconsideration "final" for purposes of judicial review without requiring the claimant to request an ALJ hearing or Appeals Council review. 42 C.F.R. 405.718-405.718c.[27] The individual then has 60 days within which to seek judicial review. 42 C.F.R. 405.718d.

In promulgating these regulations, the Secretary explained that where the specified conditions have been satisfied, he could be confident that the claim had been presented at a sufficiently high level to afford an opportunity to correct errors; to have a complete record with respect to the facts, law, and possible alternative bases of entitlement; and to insure national uniformity. 40 Fed. Reg. 53385 (1975). In these circumstances, the Secretary determined, further pursuit of administrative proceedings would be "clearly futile." *Ibid.* However, in accordance with the Court's admonition in *Salfi* that "a court may not substitute its conclusion as to futility for the contrary conclusion of the Secretary" (422 U.S. at 767), the Secretary explained that the denial of a claimant's request to pursue the expedited procedure[28] "will not be subject to the right to administrative or judicial review." 40 Fed. Reg. 53385.

The procedures adopted by the Secretary in cases raising constitutional issues assure that the question of exhaustion of administrative remedies itself will be

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[27] If the individual already has requested an ALJ hearing or Appeals Council review, the agreement to invoke the expedited judicial review procedure must be approved by the chief ALJ or the Appeals Council, respectively. 42 C.F.R. 405.718c(a)(2).

[28] See 42 C.F.R. 405.718e (request will be denied when the Secretary concludes that not all conditions have been satisfied).

presented to and be expressly ruled upon by the Secretary in each case and that judicial review will be accelerated only on the basis of a specific finding by the Secretary that the particular claim in issue need not be reviewed further administratively. Moreover, as the government explained to this Court in its Supplemental Brief in *Mathews* v. *Diaz*, when the regulations implementing *Salfi* were being considered for promulgation in September 1975 (Supp. Br. for Appellant at 5 n.2, *Mathews* v. *Diaz*, *supra* (No. 73-1046, 1975 Term)), the regulations assure consistent treatment of a broad range of cases that claimants may assert are ripe for immediate judicial review. The formal procedure for dispensing with the exhaustion requirement also guarantees that the claimant and the Secretary have formally stipulated to the fact that further exhaustion may be dispensed with in the particular case, thereby making it unnecessary for the parties to engage in extensive litigation on this question in subsequent judicial proceedings and unnecessary for the court in those proceedings to infer from what otherwise might be ambiguous circumstances whether the Secretary had actually concluded that further administrative proceedings are not required.

In contrast to the special category of cases raising constitutional issues, the Secretary has not authorized avoidance of full exhaustion of administrative remedies in any other circumstances—including those, as here, in which the claimant challenges a ruling or instruction issued by the Secretary. Her express provision for such a procedure in the one limited category but not in others establishes that the Secretary deliberately foreclosed any such bypass in other cases. *Lehman* v. *Nakshian*, 453 U.S. 156, 162-163 (1981). The court of appeals failed to respect this judgment.

Indeed, given the detailed restrictions in the special regulations relating to constitutional questions, it is untenable to suppose that the Secretary would dispense with exhaustion of administrative remedies in the wholesale and cavalier manner the court of appeals has permitted in this case. The court of appeals' opinion does not require that the issue of exhaustion itself be pre-

sented to the Secretary for decision in each individual claimant's case, as is required by the regulations permitting accelerated judicial review of claims raising a constitutional attack on the Social Security Act. The court of appeals instead has allowed an abrogation of exhaustion principles for any claimant allegedly affected by a regulation. Moreover, respondents clearly *do* challenge the Secretary's interpretation and application of the statutory provision barring payment for services that are not reasonable and necessary, and there has been no stipulation by respondents and the Secretary that they are in agreement on the proper resolution of any factual issues involved. Either of these factors alone would disqualify respondents from resort to the special expediting procedure the Secretary has established in the case of constitutional issues. Finally, unlike the constitutional issue presented in *Salfi*, the question respondents seek to raise —the coverage of BCBR under Medicare—not only is within the competence of the Secretary, but is one that Congress has expressly directed her to decide. 42 U.S.C. 1395ff(a). Thus, none of the factors supporting the exception to the exhaustion requirement recognized in the Secretary's regulations implementing *Salfi* supports the court of appeals' circumvention of the regulations requiring ALJ and Appeals Council review before an action may be brought under 42 U.S.C. 405(g).[29] But even if the court of appeals believed otherwise, the court was not authorized to excuse respondents from satisfying the requirement of ALJ and Appeals Council review. That is a matter for the Secretary to decide.[30]

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[29] Respondents rely (Br. in Opp. 8, 10, 12, 16) on *Mathews* v. *Diaz* to excuse exhaustion here. But in *Diaz*, as in *Salfi*, there was agreement between the parties that no facts were in dispute in the individual case and that the only issue to be resolved was the constitutionality of a statutory provision that was beyond the Secretary's competence to decide. 426 U.S. at 76-77 n.11. Moreover, the proceedings in district court in *Mathews* v. *Diaz* occurred before the Secretary adopted regulations to bring order to the determination of when a "final decision" has been rendered.

[30] Other courts of appeals have recognized that administrative remedies must be exhausted before seeking judicial review even

3. Although a claimant who does not qualify under the regulations applicable to cases raising only constitutional issues cannot wholly bypass the ALJ and Appeals Council stages, as respondents attempted to do in this case, applicable regulations do provide a separate mechanism by which that process may be expedited. If the claimant believes that an oral hearing is unnecessary in his case, he may request that the ALJ decide it on the written record without an oral hearing. 42 C.F.R. 405.701(c), incorporating 20 C.F.R. 404.948 (b). The Secretary's operating instructions provide that such cases are to be given "immediate attention" by the ALJ. If the ALJ agrees with the claimant, after a review of the claims file, that an oral hearing is not necessary, the ALJ is expected to issue his decision within 30 days of his receipt of the claims file. Social Security Administration, U.S. Dep't of Health and Human Services, *Office of Hearings and Appeals Handbook*, Pt. 1, § 1-313(4) (Apr. 1982); see also *id.* at Pt. 2, § 2-1331. Under these provisions, if a claimant believes that the relevant facts are not in dispute and that his case will be governed at the ALJ stage by a regulatory provision that binds the ALJ, the case would appear to be suitable for disposi-

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where the court believes that the particular issue on which judicial review is sought is unlikely to be resolved in the claimant's favor at the administrative level. See, *e.g.*, *Hopewell Nursing Home, Inc.* v. *Schweiker*, *supra*, 666 F.2d at 40, 42; *Humana of South Carolina, Inc.* v. *Califano*, *supra*, 590 F.2d at 1075-1076; *Rhode Island Hospital* v. *Califano*, *supra*, 585 F.2d at 1159; cf. *Hadley Memorial Hospital, Inc.* v. *Schweiker*, *supra*, 689 F.2d at 912.

This is Congress' understanding of the statutory scheme as well. In 1980, Congress amended 42 U.S.C. 1395oo(f), which provides for judicial review of reimbursement decisions under Part A by the Provider Reimbursement Review Board in a manner similar to that provided for individual claims under 42 U.S.C. 405(g), to authorize immediate judicial review of a question of law or regulations whenever *the Board* determines that it is without authority to decide the question. This indicates that the solution preferred by Congress when a case presents a legal question that cannot be resolved at the administrative level likewise is not to permit a court to excuse exhaustion, as the court of appeals did here, but to provide a mechanism for the Secretary to expedite that exhaustion. See

tion under this expedited procedure.[31] Similarly, if the Appeals Council is satisfied on a request for review that no other matters are in issue and the claim is controlled by a formal ruling or regulation that binds the Appeals Council, it ordinarily could be expected to deny the request for review promptly and thereby clear the way for judicial review.

Against this background, there is no reason to believe that the requirement of exhaustion of administrative remedies through the Appeals Council stage will cause substantial hardship or delay for those claimants whose cases actually are governed by a regulation that bars recovery at the administrative level and who genuinely desire to expedite the administrative process. Respondents, however, made no such effort.[32]

On the other hand, the requirement that claimants exhaust their administrative remedies before presenting their claims to a court, despite a rule that appears to bar an award in administrative proceedings, does further important governmental interests under the Social Security Act. It furnishes the ALJ and the Appeals Coun-

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National Ass'n of Home Health Agencies v. *Schweiker*, *supra*, 690 F.2d at 939. Moreover, the legislative history shows that Congress recognized that "[u]nder present law," judicial review is not available on an isolated legal issue until the Board has rendered a final decision on the entire case. H.R. Rep. No. 96-1167, 96th Cong., 2d Sess. 394 (1980).

[31] We note in this regard that, according to data compiled by the Appeals Council in its July 22, 1983 letter to counsel for respondents (see note 8, *supra*), some 16 BCBR cases pending before the Appeals Council on requests for review were decided by ALJs without an oral hearing because it was thought that such hearings were unnecessary in view of the HCFA ruling that bound the ALJ. In *In re Winter*, the consolidated ALJ decision involving 132 BCBR claimants, the ALJ likewise disposed of 59 cases on the basis of the HCFA ruling (slip op. 1-4, 34-35).

[32] To the contrary, respondents Holmes and Webster-Zieber waited so long to request an ALJ hearing that their request was untimely. We also have been informed by HHS that neither they nor respondent Vescio sought to waive their right to an oral hearing, and they actually requested the Appeals Council to *stay* its consideration of their cases (see note 8, *supra*).

cil with an opportunity to screen pending cases to determine whether the rule in fact applies to particular cases and whether the claims should be granted or denied for reasons unrelated to the rule. If it appears to the ALJ on closer examination that the rule does not apply, he then may receive and review any necessary evidence in order to dispose of the case expeditiously in light of the changed circumstances. That is precisely what happened here. The 1980 HCFA ruling respondents attack was not applied to them because they had BCBR surgery before its effective date, and the ALJ received extensive evidence relating to the coverage of such pre-1980 surgery. Even in the case of post-1980 BCBR surgery, the ALJ might conclude that payment may be made under Medicare because the case falls within one of the exceptions in the 1980 ruling, such as that for situations in which there is a mass in the carotid body (see note 5, *supra*).

The requirement of exhaustion also enables the ALJ to determine whether a particular claim is "invalid for other reasons" (*Weinberger* v. *Salfi*, *supra*, 422 U.S. at 762), quite aside from a challenged rule. The ALJ might conclude, for example, that the individual was not covered by Medicare or that the particular procedure was not "reasonable and necessary" for other reasons. Thus, in the case of BCBR, an ALJ might determine that a particular claimant in fact did not suffer from symptoms that would warrant BCBR surgery even in the circumstances respondent urge. In the instant case, the ALJ found respondents Holmes and Webster-Zieber ineligible for still other reasons: they had failed to request review in the time allowed. See page 13, *supra*.

Similarly, review by the Appeals Council, which has nationwide jurisdiction, serves important purposes that are not significantly addressed at other stages in the administrative process. Appeals Council review helps to ensure that the complex statutory and regulatory provisions governing Social Security claims are uniformly applied by the more than 800 ALJs and thereby to furnish an opportunity to correct erroneous interpretations by individual ALJs. Appeals Council review also may serve to focus

attention on particular issues affecting a number of claimants and provide a catalyst to reassess Departmental policies, as occurred after the decision in *In re Ferguson* regarding BCBR. See pages 8-9, *supra*.

In sum, as the Court observed in *Salfi*, exhaustion prevents "premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefits of its experience and expertise, and to compile a record which is adequate for judicial review." 422 U.S. at 765. Only then is judicial review available under 42 U.S.C. 405(g). The court of appeals failed to respect these considerations.

4. The court of appeals also held that this Court's decision in *Mathews* v. *Eldridge* warranted dispensing with the exhaustion requirement here (Pet. App. 9a-10a). This holding, too, was quite mistaken. In *Mathews* v. *Eldridge*, the Court stated that even when the Secretary has determined that the decision on a given claim is not yet final for purposes of seeking judicial review, "cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate" (424 U.S. at 330). The contention of the plaintiff in *Mathews* v. *Eldridge* that he had a constitutional right to a hearing prior to the termination of his disability benefits was found to be such an issue. The Court relied on two factors. First, the constitutional issue was "entirely collateral to the substantive claim of entitlement." 424 U.S. at 330. Second, the very nature of the plaintiff's asserted constitutional right to a predeprivation hearing rested on the proposition that full relief could not be obtained following a postdeprivation hearing; in view of the plaintiff's physical condition and dependency on disability benefits, the Court concluded that he had made a "colorable claim" that an erroneous prehearing termination of benefits would injure him in a way that would not be recompensable through retroactive payments if he were found eligible after a hearing. *Id.* at 331. Thus, the Court reasoned, unlike in *Salfi*, the

plaintiffs' constitutional challenge would not be answered if his substantive claim were denied "for other reasons" or upheld "under other provisions" in the course of administrative exhaustion. 424 U.S. at 331-333, quoting *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 762.

The factors supporting the exception to the exhaustion requirement recognized in *Mathews* v. *Eldridge* are wholly absent here. Respondents' challenge to the instructions and HCFA ruling barring reimbursement for BCBR is not at all "collateral" to their substantive claim of entitlement; it is intimately bound up with respondents' substantive contention that the BCBR surgery is reasonable and necessary within the meaning of the Medicare Act. Furthermore, in *Mathews* v. *Eldridge*, the court permitted a limited detour from the administrative process only to permit judicial resolution of the collateral issue regarding a pretermination hearing, not the claim to disability benefits on the merits. Here, in contrast, respondents seek to avoid the administrative process entirely by having the court resolve their claims on the merits.

Respondents also have advanced no colorable claim that an erroneous denial of benefits for the BCBR procedure at an early stage in the administrative proceedings will injure them in a way that cannot adequately be remedied if they are subsequently awarded benefits upon a finding by an ALJ, the Appeals Council, or a court that BCBR is a reasonable and necessary procedure. Unlike the plaintiff in *Mathews* v. *Eldridge*, respondents are not receiving benefits that HHS has sought to terminate and on which they might have become dependent.[23] They are simply seeking a one-time reimbursement for a particular medical procedure that has already occurred. And as in *Salfi*, but unlike in *Mathews* v. *Eldridge*, respondents' asserted claim to payment for BCBR will be sufficiently answered if they are awarded benefits notwithstanding the rulings

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[23] The Court in *Mathews* v. *Eldridge* found even these considerations in a disability case insufficient to require a hearing before benefits are terminated. 424 U.S. at 335-349.

they challenge in this suit or if their benefits are denied for other reasons.

5. Respondents also contend (Br. in Opp. 2, 12, 13-14 n.8, 18-19, 20, 23) that exhaustion of administrative remedies should be excused because they should not be required to "relitigate" in administrative proceedings the question of the coverage of BCBR under Medicare. Respondents argue that the coverage question was decided in favor of the claimants in the Appeals Council's decision in *In re Ferguson* and that, as a result, HCFA was collaterally estopped from issuing the 1980 ruling barring payment for BCBR. This contention is frivolous. To begin with, because the 1980 ruling did not apply to the only three respondents who filed an application for payment for BCBR, they have no standing to challenge it. See page 13, *supra*.

Moreover, the Appeals Council explicitly stated in *In re Ferguson* that its decision was not to be regarded as definitive on the BCBR issue and was not to be cited as precedent in future cases (slip op. 23). The Secretary plainly would not be required to give collateral estoppel to such a decision. But even if the Appeals Council had been more definitive in its prior decision, this could not forever bar the Secretary from taking a different view of the matter. One of the reasons for relying upon rulings of general applicability in administering the Social Security Act is to correct perceived errors and inconsistencies in prior decisions. *Heckler* v. *Campbell*, *supra*. In the case of BCBR, for example, the separate decisions in *In re Ferguson* and *In re Winter* reached opposite conclusions on whether BCBR is a reasonable and necessary procedure.

For these reasons, the weight that should be given in administrative proceedings to a prior administrative ruling in a similar case is itself a question of the procedure to be followed in determining individual claims that Congress has authorized the Secretary to resolve. See 42 U.S.C. 405(a) and 1395ff(a). Cf. *W.R. Grace & Co.* v. *Local 759, Int'l Union of Rubber Workers*, No. 81-1314

(May 31, 1983), slip op. 7-8. And she has done so. Applicable regulations provide that if an issue in an ALJ hearing was decided in a prior case "involving the same parties," the resolution of that issue will not be considered again "unless there are reasons to believe it was wrong." 42 C.F.R. 405.701(c), incorporating 20 C.F.R. 404.950(f). That regulation clearly does not require the application of collateral estoppel in respondents' cases on the basis of decisions involving *other* parties, especially where both the ALJ in *In re Winter* and HCFA in issuing the 1980 ruling found reason to believe that the conclusion reached in the prior decision in *In re Ferguson*, upon which respondents rely, was wrong.

In any event, there is no reason why respondents should not be required to present their collateral estoppel argument in the course of administrative proceedings before presenting it to the courts, just as they must do with respect to other arguments in support of their benefit claims. See *Continental Can Co.* v. *Marshall*, 603 F.2d 590 (7th Cir. 1979). This would permit the ALJ and Appeals Council to conduct an inquiry into the precedential nature of the prior administrative decisions that respondents contend should be given preclusive effect. As we have explained above, the ALJ in *In re Winter*—respondents' case—did exactly that: the ALJ considered the preclusion argument and rejected it, because of the non-precedential nature of the decision in *In re Ferguson*. Moreover, an ALJ or the Appeals Council might conclude that prior decisions should be followed as a matter of administrative stare decisis, thereby obviating any need to resolve the collateral estoppel issue. And exhaustion of administrative remedies on the collateral estoppel issue at least would assure that the court, on judicial review under 42 U.S.C. 405(g), would have the benefit of the Secretary's interpretation of the Social Security Act and implementing regulations with regard to the application of collateral estoppel in the particular administrative proceeding. *Cf. W.R. Grace & Co.* v. *Local 759, Int'l Union of Rubber Workers, supra*, slip op. 7-8.

6. Because respondents can point to no substantial need for immediate judicial review, their argument against exhaustion of administrative remedies reduces to nothing more than a desire to avoid the administrative process for its own sake. This Court has made clear, however, that the mere fact that a party must assume whatever burden might be entailed in participation in administrative proceedings does not constitute irreparable injury warranting the bypassing of those proceedings in favor of immediate judicial review. See, *e.g.*, *FTC* v. *Standard Oil of California*, 449 U.S. 232, 244 (1980). Nor, contrary to respondents' suggestion (Br. in Opp. 21), does the fact that respondents might actually prevail in administrative proceedings and thereby moot the issues on which they now seek judicial review warrant avoiding the administrative proceedings. To the contrary, one of the principal reasons to await a final agency decision is that the agency's consideration of the matter might obviate all occasion for judicial review. 449 U.S. at 244 n.11.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. (Supp. V) 1331 provides:

> Federal question
>
> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

2. 28 U.S.C. 1361 provides:

> Action to compel an officer of the United States to perform his duty
>
> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

3. Sections 205(g) and (h) of the Social Security Act, as codified at 42 U.S.C. (& Supp. V) 405(g) and (h) provide:

> Evidence, procedure, and certification for payments
>
> * * * * *
>
> (g) Judicial review
>
> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of busi-

ness within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to

the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

(h) Finality of Secretary's decision

The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under sections 1331 or 1346 of title 28 to recover on any claim arising under this subchapter.

4. Sections 1869(a) and (b) of the Social Security Act, as codified at 42 U.S.C. 1395ff(a) and (b), provide:

Determinations of Secretary

(a) Entitlement to and amount of benefits

The determination of whether an individual is entitled to benefits under part A or part B, and the determination of the amount of benefits under part A, shall be made by the Secretary in accordance with regulations prescribed by him.

(b) Appeal by individuals

(1) Any individual dissatisfied with any determination under subsection (a) of this section as to—

(A) whether he meets the conditions of section 426 or section 426a of this title, or

(B) whether he is eligible to enroll and has enrolled pursuant to the provisions of part B of

this subchapter, or section 1395i-2 of this title, or section 1819, or

(C) the amount of benefits under part A (including a determination where such amount is determined to be zero)

shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 405 (b) of this title and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title.

(2) Notwithstanding the provisions of subparagraph (C) of paragraph (1) of this subsection, a hearing shall not be available to an individual by reason of such subparagraph (C) if the amount in controversy is less than $100; nor shall judicial review be available to an individual by reason of such subparagraph (C) if the amount in controversy is less than $1,000.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 416523 81

Office-Supreme Court, U.S.
FILED
OCT 20 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1772

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,
Petitioner,

v.

FREEMAN H. RINGER, *et al.*,
Respondents.

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STATEMENT OF THE CASE.

I. Introduction.

This case raises jurisdictional issues settled by this Court's decision in *Mathews v. Diaz*, 426 U.S. 67 (1976). Characterization of the issues here as jurisdictional, however, masks the true nature of this case behind overly technical legal constructs. In fact, this case squarely raises the question of abuse of rights which arises whenever an administrative agency assumes it can act without accountability or judicial restraint. This is a case of an administrative agency at war with itself—an agency which simultaneously mandates exhaustion of administrative procedures while prohibiting their effective application, an agency which demands that administrative relief be sought while declaring such relief to be unavailable.[1]

Plaintiffs' principal complaint is that the Secretary of Health and Human Services, the petitioner, requires every person seeking medicare reimbursement for a surgical procedure known as bilateral carotid body resection ("BCBR") to litigate administratively the safety and efficacy of the procedure as a prerequisite to eligibility for such reimbursement. The Secretary insists on relitigating the same issues in every case even though 170 claimants have exhausted fully the administrative process, in some twenty-five consolidated cases. Further, prior to the filing of this action, in *every* case the Secretary's administrative law judges ("ALJs") and the Appeals Council, the highest quasi-adjudicative body within the Department of Health and Human Services, had held that BCBR was safe and effective and ruled that the medicare program must pay the costs of the surgery. The Secretary

[1] The Secretary's description of the medicare program is adequate and will not be repeated. Plaintiffs do not, however, agree with the Secretary's argumentative characterization of some of the pertinent statutes and regulations. Similarly, plaintiffs do not accept the Secretary's conclusion with respect to the continuing validity of their Part B constitutional claims. *See Schweiker v. McClure*, 456 U.S. 188 (1982).

continues to demand more administrative litigation on these same issues despite her admission that "on October 28, 1980, HCFA [the Health Care Financing Administration] issued a formal administrative ruling—binding upon ALJs and the Appeals Council—that prohibited payments under Medicare for BCBR performed after that date." Brief for the Petitioner at 9.

In the District Court plaintiffs sought both a declaration that the Secretary's "relitigation" policy was illegal and an injunction precluding further application of the policy. Plaintiffs did *not* seek a determination of eligibility for benefits, or an order requiring the payment of benefits. Nevertheless, the Secretary urged the District Court to dismiss plaintiffs' challenge to her procedures on the ground that the Social Security Act, 42 U.S.C. § 405(h), requires plaintiffs, as a jurisdictional prerequisite, to exhaust the very administrative procedures they are challenging. The District Court granted the Secretary's motion and dismissed the case, but the Court of Appeals reversed, 697 F.2d 1291 (9th Cir. 1982), on the authority of *Weinberger v. Salfi*, 422 U.S. 749 (1975) and *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Secretary now asks this Court to revise significantly the guiding jurisdictional principles set out in *Salfi* and *Eldridge* and to overrule *Mathews v. Diaz*, 426 U.S. 67 (1976). The decision of the Court of Appeals was correct and should be affirmed.

II. Factual Background.

Bilateral carotid body resection ("BCBR") is a surgical procedure developed in the early 1960's for relief of the symptoms of severe chronic obstructive pulmonary disease ("COPD") (*e.g.*, chronic bronchitis, emphysema, asthma).[2]

[2] The carotid bodies are structures the size of a rice grain located on each side of the neck which are involved in a reflex system which controls the diameter of the bronchical tubes. Under normal conditions, when the carotid body senses a significantly reduced blood oxygen level, nerve impulses are generated, triggering a reflex system which rapidly increases ventilation, reducing the level of carbon dioxide in the blood. Thereafter, ventilation is reduced and the respiratory system is returned to a normal, steady rate. In people who have COPD, the reflex system is hyperreactive and triggers at a

(footnote continues)

Beginning in the mid 1970's the Secretary refused to pay medicare benefits for BCBR unless ordered to do so by an ALJ, on the ground that BCBR is never "reasonable and necessary" treatment for pulmonary disease. The Secretary contends that BCBR is not accepted generally by the medical community and that "controlled clinical studies establishing the safety and effectiveness of this procedure are needed." Brief for the Petitioner at 7. The Secretary's position is based upon an alleged lack of data and *not* upon data suggesting that BCBR is unsafe or ineffective.

Despite the Secretary's prohibition on payment for BCBR, many medicare beneficiaries have undergone the surgery, initially at their own expense and usually as a last resort for relief from otherwise intractable pulmonary symptoms. The Secretary uniformly denies claims for reimbursement, and medicare beneficiaries regularly challenge the denial in administrative hearings. In *every one* of the 170 claims decided prior to the filing of this lawsuit, an ALJ found BCBR to be reasonable and necessary medical treatment, and the medicare program was ordered to reimburse the claimant for the cost of the surgery. The 170 claims were decided in approximately twenty-five separate cases by at least ten different ALJs.

Following rejection of the "nonpayment" policy in the first 70 appeals, the Secretary appealed the decisions as a group to the HHS Appeals Council, a panel of administrative law judges which is the highest administrative hearing body with jurisdic-

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(footnote continued)

much lower threshold than it does in normal individuals, producing a severe bronchospasm, sometimes evident clinically as an asthmatic attack, chronic bronchitis (coughing), or emphysema (*i.e.*, shortness of breath). Considerable evidence developed through use of the Winter technique of BCBR seems to indicate that removal of the carotid bodies immediately changes (*i.e.*, elevates) the threshold at which the reflex system triggers, relieving the bronchospasm of COPD patients and opening the bronchial passages. After BCBR, the patient will experience fewer or no reflex responses unless there is an overwhelming stimulus. BCBR surgery does not cure COPD. However, the change effected by BCBR may be sufficient to preclude further symptoms for the remainder of the patient's life, thereby allowing the patient to lead a more independent and normal life. Further, because the debilitating symptoms of COPD largely are eliminated by BCBR, patients require fewer doctor visits and the need for repeated hospitalization—all reimbursed by medicare—is likewise often eliminated. *See generally In re Ferguson*, No. 126-12-3830 (HHS Appeals Council, October 18, 1979).

tion to review the cases.[3] The Appeals Council limited its review to the medical evidence relied upon by the Secretary to support her "nonpayment" policy, and declined to hear testimony from individual patients because, based on the records below, it assumed that all claimants would testify favorably. *See In re Ferguson,* No. 126-12-3830 at 3 (HHS Appeals Council, Oct. 18, 1979). After three days of hearings devoted exclusively to expert medical testimony, the Appeals Council held that the available medical evidence did not justify the Secretary's policy of nonpayment for BCBR, ruled that BCBR was reasonable, necessary and effective medical treatment for pulmonary distress in the cases at issue, and ordered the medicare program to pay in those cases. *Id.* at 23-24.

The Appeals Council's decision is a reasoned and thorough rejection of the Secretary's "nonpayment" policy. The Appeals Council's decision rests on four premises. First, the Appeals Council reviewed a 1978 Report of a National Institutes of Health Task Force on BCBR which the Secretary claimed supported her policy and concluded that, rather than supporting the Secretary's ban on payment, the NIH Task Force report "did not recommend that the operation cease to be performed," but instead suggested that *more* detailed studies should be conducted of patients *"currently undergoing"* BCBR. *Id.* at 18 (emphasis in quoted portion appears in the text). Second, the Appeals Council also found that BCBR had support within "some segments of the medical community" *id.* at 19, and that, while BCBR apparently is not prescribed or supported by most doctors, more than twenty-five physicians, all of whom had clinical experience with BCBR patients, had testified orally or in writing before the Appeals Council, reporting "very good" to "spectacular" and "astounding" results. *Id.* at 14-16, 19. Third, the Appeals Council found that "overwhelming" evidence "establishes that the enhanced quality of life . . . [of BCBR patients] has been demonstrated." *Id.* at 19.

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[3] Technically, only one case was before the Appeals Council, but the parties stipulated that the decision would govern all 70 cases decided by ALJs to that point. Consolidation was possible because the single issue in each ALJ hearing was the validity of the Secretary's policy forbidding payment. *In re Ferguson,* No. 126-12-3830 at 3 (HHS Appeals Council, October 18, 1979).

In view of the demonstrated efficacy of BCBR, the Appeals Council stated that the "issue . . . is whether the long-range death rates of [BCBR] patients are so high as to be unacceptable" when compared to alternative methods of treatment. *Id.* After comparing mortality figures for 384 BCBR patients against similar figures for patients treated conventionally, the Appeals Council concluded that even though BCBR "patients were older and presumably were [more] seriously ill" than the patients in the baseline studies, "[t]he record . . . does not show a greater mortality rate for [BCBR] patients than for those under medical management." *Id.* at 22.

The Appeals Council stated that its conclusion was not definitive or precedential because "[f]uture studies and data may compel a different conclusion," a position which is both prudent and consistent with the position plaintiffs have taken throughout this litigation. *Id.* at 23. Despite requests by the NIH Task Force on BCBR, the Appeals Council and numerous physicians and physiologists for clinical trials of BCBR, the Secretary has made no effort to conduct scientific studies or obtain new data on BCBR. Instead, the Secretary freely admits that her present "nonpayment" policy is predicated upon exactly the same evidence that the Appeals Council found insufficient to preclude payment in 1979. Brief for the Petitioner at 6-7, 9. The Appeals Council subsequently has followed *Ferguson* and awarded benefits for BCBR, without a hearing. *In re Kohnen*, No. 335-07-2535 (HHS Appeals Council, Dec. 4, 1979).

Plaintiffs' initial complaint, filed in September, 1980, sought declaratory and injunctive relief precluding the Secretary from adhering to illegal claims review procedures which required every BCBR claimant to pursue essentially duplicative and meaningless hearings as a prerequisite to eligibility for benefits.[4] Plaintiffs did *not* seek a determination that any claimant was eligible for medicare benefits and did not request that the court order payment of benefits.[5] The relief sought by plaintiffs, if granted, will affect the procedures utilized to review benefit claims for BCBR *before* any claimant's eligibility for benefits is determined. Not one cent of medicare benefits will be paid as a direct or consequential result of a District Court ruling in plaintiffs' favor. In fact, recognizing that the District Court would not award benefits, plaintiffs have pursued their benefit claims through the administrative procedures established by the Secretary even while challenging the nonpayment policy.

In October, 1980, one month after suit was filed in this case, the Secretary published a Health Care Financing Administration ("HCFA") Ruling prohibiting medicare payment for BCBR in any circumstances. 45 *Fed. Reg.* 71426 (Oct. 28, 1980). The Ruling merely formalized the policy banning payment for BCBR which the Appeals Council had rejected one year before in the *Ferguson* case. The Ruling *precluding*

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[4] Named plaintiffs in the initial Complaint, which was styled a class action, were Freeman H. Ringer, Sanford Holmes, Norman R. Webster-Zieber, Dorothy Briggs, Ernie Haley, Jean Vescio and Benjamin Winter, M.D. Since the filing of that Complaint plaintiffs Briggs, Haley and Vescio have died. All plaintiffs except Benjamin Winter suffer from severe chronic obstructive lung disease and either have had or wish to have BCBR. Plaintiff Winter is the physician of the patient plaintiffs and, in addition, serves (pursuant to 20 C.F.R. §404.1700 *et seq.* (1980)), without compensation, as the representative for numerous BCBR claimants in administrative hearings. Although the Secretary filed a "Notice of Non-Opposition" to Plaintiffs' Motion for Class Certification, *see* J.A. at 2, item 15, the District Court never ruled on that Motion.

[5] The Court of Appeals nonetheless held that respondents' secondary claims were claims for benefits under the Medicare Act but that plaintiffs' "central...procedural claims may be considered apart from these claims." *Ringer v. Schweiker*, 697 F.2d 1291, 1294 (9th Cir. 1982).

payment for BCBR was based almost entirely on the 1978 NIH Task Force Report that the Appeals Council relied upon as support for *compelling* payment. *Id.* Since the promulgation of the BCBR Ruling, one ALJ has refused to order payment for BCBR.[6] Plaintiffs' Amended Complaint added counts challenging the procedures by which the Secretary promulgated the Ruling.

The Secretary has stated over and over again that "[b]y reason of the Secretary's ruling published in the *Federal Register*, the administrative law judges and the appeals council are required to follow the Secretary's ruling precluding coverage for BCBR" (Secretary's Brief in the Court of Appeals at 28 n.11), and that, due to the Ruling, "no beneficiaries will be reimbursed for BCBR." *Id.* at *20. *See also,* 45 *Fed. Reg.* 71426, 71427 (Oct. 28, 1980). In the District Court the Secretary stipulated that:

> The Department of Health and Human Services has ruled that "Bilateral carotid body resection performed to relieve and treat pulmonary symptoms and diseases is not established as safe and effective and, therefore, is excluded from Medicare coverage under the authority of Section 1862(a)(1) of the Act."

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[6] Plaintiffs submitted a copy of the decision in this case to the Ninth Circuit Court of Appeals. The decision involved over 100 claimants, and surgeries performed both before and after the BCBR Ruling. Reimbursement was denied in all cases, but reimbursement was denied in 59 cases where the surgery occured after publication of the Ruling solely on the basis of the Ruling. *See* Petition for a Writ of Certiorari at 20 n.15.

This single adverse decision illustrates one of the practical inequities of the Secretary's position. Where, as here, the agency loses all but a single case before the ALJs, and judicial review of the single adverse decision is sought, the Secretary likely will be afforded the substantial advantage of arguing on appeal that the single decision favorable to the agency must be accorded deference and affirmed under the substantial evidence test despite the fact that prior to publication of the Ruling, the ALJs, on full consideration of the merits, regularly rejected the Secretary's position in some 170 cases.

Joint Appendix at 32. In this Court, the Secretary continues to assert that the Ruling binds both ALJs and the Appeals Council to deny all claims for BCBR:

> In response to these developments on October 28, 1980, HCFA issued a formal administrative ruling—binding upon ALJs and the Appeals Council—that prohibited payments under Medicare for BCBR performed after that date. 45 *Fed. Reg.* 71426-71427 (1980); see 20 C.F.R. § 422.408.

Brief for the Petitioner at 9. *See* also Petition for a Writ of Certiorari at 6. All claims presented to an ALJ for BCBR performed after October 1, 1980 have been denied based solely upon the Ruling.[7]

Despite her admission that BCBR patients cannot obtain benefits through the administrative process, the Secretary insists that all administrative remedies must be exhausted completely as a jurisdictional prerequisite to judicial review. The significance of the Secretary's demand for further administrative litigation should not be lost in the technical legal arguments.

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[7] At least 50 cases in which BCBR reimbursement claims were dismissed without hearing by ALJs solely on the basis of the Ruling were appealed to the Appeals Council. On May 3, 1982 the Appeals Council reversed the dismissals of a group of 10 of these cases and remanded the cases to ALJs for hearings on the ground that 42 C.F.R. §405.720 guarantees claimants the right to a hearing. The Appeals Council did not address either the merits of the dismissals or the validity of the Ruling. No hearings ever were held, however, and in August of 1982 the Appeals Council proposed to take jurisdiction over and consolidate every pending administrative case presenting any issue relating to BCBR. Plaintiffs' counsel and the Appeals Council staff calculated that there were at least 170 such cases pending at various stages of the administrative process at that time (in addition to the 170 cases which had completed the administrative process). Based on past claims experience, there are probably well over 200 administrative BCBR cases pending today solely as the result of the relitigation policy challenged in this case.

All BCBR claimants are, by definition, severely ill with incurable respiratory diseases.[8] Since this action was filed three years ago, three of the original six named plaintiffs have died. One of the plaintiffs, Ernie M. Haley, was unable to pay for BCBR and then seek reimbursement, and died while awaiting BCBR. Plaintiff Ringer likewise is unable to afford the operation and has been forced to endure his debilitating pulmonary symptoms during the course of this litigation. *See* J.A. at 32. Plaintiff Jean Vescio could not afford BCBR, which had been prescribed by her physician at the time the case was filed. However, after filing of the original complaint, Ms. Vescio's physician determined that her physical condition was deteriorating so rapidly that BCBR could not be delayed despite the Secretary's payment prohibition. Hospital and surgical services were arranged for Ms. Vescio on an emergency basis without any assurance of payment and, on October 11, 1980, Ms. Vescio underwent BCBR and thereafter filed a claim for payment.[9] The impact of the Secretary's policy is most acute for those medicare beneficiaries, who, unlike Ms. Vescio, are unable to obtain emergency care without charge and are therefore left to suffer or perhaps, to die. Similarly, the Secretary does not explain how claimants who are unable to pay for the surgery, file a claim for reimbursement and then litigate the claim administratively, ever could challenge the Secretary's policy.[10]

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[8] Note that the Appeals Council calculated death rates over a term of only three years. Forty-four percent of the patients who did not receive BCBR were dead within three years while slightly more than thirty percent of BCBR patients died within three years of surgery. *In re Ferguson*, No. 126-12-383 at 20-22 (HHS Appeals Council, Oct. 18, 1978). The Council also noted that the mean age for the 384 BCBR patients which it studied was 66 years. This case bears out the suggestion implicit in the data.

[9] Counsel understands that Ms. Vescio survived until December 26, 1982.

[10] Plaintiff Ringer, for example, never had the surgery and thus did not file a formal claim for payment of medicare benefits, but he did informally request (by letter) that reimbursement be made available for his surgery. Mr. Ringer was advised that no information could be provided unless he underwent treatment and filed a claim for reimbursement. Ms. Vescio also sought to determine coverage prior to obtaining BCBR. Ms. Vescio was advised that BCBR was excluded from coverage and would not be covered (Filed as Exhibits in Court of Appeals, December 28, 1981. *See* J.A. at 5). Under *Mathews v. Eldridge*, 424 U.S. 319, 329 (1976) the filing of such a request constitutes the filing of a claim under 42 U.S.C. §405. The Court of Appeals apparently believed that it was unnecessary to address these issues. 697 F.2d at 1296 n.4. The Court of Appeals did not hold, as the Secretary claims, that there was no jurisdiction over Mr. Ringer's claims.

SUMMARY OF ARGUMENT.

The Court of Appeals correctly held that complete exhaustion of administrative remedies is not a jurisdictional prerequisite to judicial review where, as here, "the Secretary's ruling makes the results of the [administrative] process both pre-ordained and immutable" so that "appeals [are] futile . . . [and] worthless to the Agency as well as the claimant." 697 F.2d 1295-96. Thus, as in *Mathews v. Diaz*, 426 U.S. 67 (1976), the Secretary's admission that the Ruling absolutely prohibits even ALJs and the Appeals Council from awarding benefits for BCBR is "tantamount to a decision denying the application and a waiver of the exhaustion requirements." 426 U.S. at 73, 76-77. Moreover, because plaintiffs challenge the Secretary's right to relitigate the validity of the BCBR policy—and not the substantive merits of the policy or of a benefit determination—further administrative exhaustion will inflict the very injury plaintiffs seek to avoid even if, as occurred prior to promulgation of the Ruling, every claimant ultimately is awarded benefits by an ALJ, or by a District Court. *Mathews v. Eldridge*, 424 U.S. 319, 328, 330 (1976).

The Secretary's contention that Congress has committed to her unfettered and unreviewable discretion the determination of when an administrative decision is "final" for purposes of judicial review ignores the holdings of this Court in *Weinberger v. Salfi*, 422 U.S. 749 (1975), *Mathews v. Eldridge*, 424 U.S. 319 (1976) and *Mathews v. Diaz*, 426 U.S. 67 (1976). In *Salfi*, *Eldridge* and *Diaz* this Court determined, *over the objection of the Secretary*, that exhaustion of administrative remedies would be futile and that complete exhaustion was not a prerequisite to judicial review. The Secretary thus invites the Court to overrule *Mathews v. Diaz* and significantly to restrict *Salfi* and *Eldrige*.

Because jurisdiction is available under 42 U.S.C. § 405(g) there is no need to determine whether jurisdiction is also available under the mandamus statute, 28 U.S.C. §1361. *Califano v. Yamasaki*, 442 U.S. 682, 698 (1979). Nonetheless, the Court of Appeals ruling that mandamus jurisdiction is available for plaintiffs' procedural claims is both correct and consistent with numerous other Circuit Court cases addressing the question. As those cases indicate, Congress gave no indication when it enacted the judicial review provisions of the Social Security Act that it intended to limit the availability of mandamus review of administrative action. The enactment of 28 U.S.C. §1361 in 1962 merely extended mandamus jurisdiction to every federal district court, and Congress has never restricted the reach of the statute in Social Security Act cases. Because plaintiffs contend that the Secretary subjects claimants to unlawful administrative review processes in violation of specific obligations imposed by law the complaint states a claim within the District Court's mandamus jurisdiction.

Finally, because 42 U.S.C. § 405(g) confers jurisdiction to hear this case whether plaintiffs' claims are characterized as "procedural" or as claims for benefits, it is unnecessary to consider other potential bases for jurisdiction. However, the Court of Appeals correctly held, in the alternative, that plaintiffs' principal claims are in fact purely "procedural" and that this is not an action "to recover on any claim" arising under the Medicare Act. 42 U.S.C. § 405(h). Consequently, federal question jurisdiction, 28 U.S.C. §1331, over respondents' complaint is neither dependent upon nor intercepted by 42 U.S.C. § 405 as interpreted and applied in *Salfi* and *Eldridge*.

ARGUMENT.

I. The Decision of the Court of Appeals Finding Jurisdiction Under 42 U.S.C. § 405(g) Is Dictated By *Weinberger v. Salfi* and Its Progeny.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court explained that Section 405(g) establishes two prerequisites—one waivable, one nonwaivable—to the exercise of jurisdiction over a claim for Medicare benefits. 424 U.S. at 328. The nonwaivable component of Section 405(g) jurisdiction is the requirement that a claim for benefits be presented to the Secretary. *Id.* at 330. The second requirement, that administrative remedies be exhausted completely, may be waived by either the Secretary or, even over the Secretary's objection, by the court. *Id. See also, Mathews v. Diaz*, 426 U.S. 67, 72-73, 76-77 (1976); *Heckler v. Lopez*, No. A-145 (Slip Op. filed Oct. 11, 1983) (Stevens, J. dissenting). In *Weinberger v. Salfi*, 422 U.S. 749 (1975), for example, the named plaintiffs had not obtained an ALJ or an Appeals Council decision, and the Secretary objected in the District Court to any waiver of the exhaustion requirement. This Court, however, determined that complete exhaustion was unnecessary, held that jurisdiction was available under 42 U.S.C. § 405(g), and ruled on the merits of the claims of the named plaintiffs. *Weinberger v. Salfi*, 422 U.S. 749, 753, 765 (1975). *See also, id.* at 801-802 (Brennan, J., dissenting).

In this case the Secretary admits that at least some of the named plaintiffs have satisfied the non-waivable requirement of 42 U.S.C. § 405(g) by filing the required claim for benefits. Brief for the Petitioner at 38. The Secretary, however, argues that complete exhaustion cannot be waived because she has determined by regulation that "full internal exhaustion" is necessary before a decision denying benefits is administratively "final" for purposes of judicial review. Brief for the Petitioner at 38-42.

Paradoxically, the Secretary also argues that the BCBR Ruling is "binding upon ALJs and the Appeals Council" and henceforth will prohibit any medicare payment for BCBR even if claimants do exhaust all of her "full internal" procedures.[11] Brief for the Petitioner at 9. *See also,* Petition for a Writ of Certiorari at 6. The Secretary's statement before this Court merely confirms identical assertions and stipulations made in the District Court and in the Court of Appeals. *See supra* at pp. 7-8. The Ruling itself states: "The purpose of this ruling, therefore, is to make our coverage decision binding on ALJs and the Appeals Council." 45 *Fed. Reg.* 71426, 71427 (Oct. 28, 1980). Thus, as the Court of Appeals noted, all BCBR claims for treatment rendered after issuance of the BCBR Ruling have been denied based solely on the Ruling. *Ringer v. Schweiker,* 697 F.2d 1291, 1293 (9th Cir. 1982).

The Secretary's repeated assertion that the ALJs and the Appeals Council are bound by the BCBR Ruling and that BCBR claims cannot be allowed under any circumstances, brings this case within the doctrine of *Mathews v. Diaz,* 426 U.S. 67 (1976) and obviates any need for further exhaustion of

[11] The Secretary's explanation of the benefits of exhaustion of her "full internal" procedures, Petitioner's Brief at 44-46, is seriously misleading. Plaintiffs do not pretend to argue that the doctrine of exhaustion of administrative remedies does not advance valuable governmental purposes. However, this case does not involve administrative claims which could "be granted or denied for reasons unrelated to the [BCBR Ruling]," or claims which could be " 'invalid for other reasons' . . . quite aside from a challenged rule." Petitioner's Brief at 45. Cases where "the individual was not covered by Medicare," or BCBR "was not reasonable or necessary for other reasons [not covered by the Ruling]," *id.,* obviously would not turn on the Ruling, so exhaustion of administrative challenges to the Ruling would never be at issue in such cases. Further, a judgment in plaintiffs' favor on the issues raised in this case would not affect in any way the Secretary's ability to dispose of BCBR cases in due course on grounds unrelated to the Ruling. For example, a judgment in plaintiffs' favor in this case would not preclude the Secretary from rejecting a claim for BCBR reimbursement by someone who was not a medicare beneficiary or who failed to file a timely claim for benefits, or by a patient who had undergone BCBR as treatment for a hangnail. Those cases, however, are not before the Court here.

administrative remedies. In *Diaz*, this Court noted that Section 405(g) jurisdiction was available to hear and decide the benefit claims of a plaintiff who had not exhausted the administrative process prescribed by regulation because "in colloquy with the [District] court [the Secretary] acknowledged that [plaintiff] had filed an application which could not be allowed under the statute." *Id.* at 73 (footnote omitted). This Court also held that jurisdiction was available to decide the claim of a second plaintiff because the Secretary had stipulated in the District Court—and reaffirmed in briefs before this Court—that his application would not be allowed. This Court ruled: "For jurisdictional purposes, we treat the stipulation in the District Court as tantamount to a decision denying the application and as a waiver of the exhaustion requirements." *Id.* at 76-77.[12]

In this case, there is much more than a concession in colloquy between counsel and the District Court. Indeed, the Secretary has admitted over and over again the accuracy of the Court of Appeals conclusion that "the Secretary's ruling makes the results of that [administrative hearing] process both pre-ordained and immutable," 697 F.2d at 1295, and, therefore, both "futile" and "worthless to the Agency as well as the

[12] While the Secretary attempts to distinguish *Salfi*, *Eldridge* and *Diaz* by arguing that the regulations which define when a decision is "final" and subject to judicial review were supplemented in 1980, the administrative process at issue has been in effect since at least 1972 *see, e.g.*, 37 *Fed. Reg.* 5814 (Mar. 22, 1972) (right to hearing) and consequently, the definition of a "final decision" was settled even before *Salfi* was decided. Further, the expedited appeal regulations upon which the Secretary also relies heavily were issued before *Diaz* was decided and were specifically called to this Court's attention. Brief for Petitioner at 41. *See also* 40 *Fed. Reg.* 53385 (Nov. 18, 1975). Thus, this Court implicitly has rejected the very position the Secretary advocates here.

claimant." *Id.* at 1296. As in *Diaz*, the Secretary's repeated concessions that all BCBR claims will be denied is tantamount to a final decision and a waiver of further administrative exhaustion.[13]

In *Salfi*, *Eldridge* and *Diaz*, this Court asserted jurisdiction over plaintiffs' substantive claims even though there had not been a single ALJ or Appeals Council decision on the issues. In contrast, in this case there have been more than 170 claims decided by at least ten different ALJs. In addition, the substantive issues have been thoroughly litigated before the Appeals Council. Thus, as the Court of Appeals noted, 697 F.2d at 1294, n.1, an extensive administrative record comprising virtually all available data on BCBR already has been compiled at great effort and expense. The Secretary's statements and the record before the Court demonstrate that "further exhaustion would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by any administrative or judicial interest." *Ringer v. Schweiker*, 697 F.2d 1291, 1295 (9th Cir. 1982), *quoting Weinberger v. Salfi*, 422 U.S. 749, 765-66 (1975).

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[13] The conclusion of this Court, expressed in *Salfi*, *Eldridge* and *Diaz*, and of the Court of Appeals below that administrative action is "final" for purposes of judicial review when it is effective and cannot be corrected by further administrative review is consistent with Congress' understanding of the term when it enacted the judicial review provision of the Administrative Procedure Act, 5 U.S.C. §704. The Senate Judiciary Committee Report states: " 'Final' action includes any effective agency action for which there is no other adequate remedy in any court." S. Rep. No. 752, 79th Cong., 1st Sess., *reprinted in*, Administrative Procedure Act: Legislative History 1944-46 at 213 (1946). In language particularly applicable here, the Report continues:

> In no case may appeal to "superior agency authority" be required by rule unless the administrative decision is inoperative, because otherwise the effect of such a requirement would be to subject the party to agency action and to repetitious administrative process without recourse. *There is a fundamental inconsistency in requiring a person to continue "exhausting" administrative processes after administration action has become, and while it remains, effective.*

Id. (emphasis added).

The Court of Appeals conclusion that the BCBR Ruling "makes clear that the Secretary will treat as final any denial of benefits for the BCBR operation," 697 F.2d at 1295, also is consistent with the rulings of other Courts of Appeals. The Second Circuit has found that even informal republication of a policy statement during litigation challenging that policy was sufficient to confer subject matter jurisdiction:

> We note also that the Secretary has had ample opportunity since the decision below to modify his position to conform to the Appeals Council rulings. Instead, during the pendency of this appeal, he has distributed new forms [reaffirming the policy rejected by the Appeals Council]. We agree with the Third Circuit that a "final position" by the Secretary may, in some circumstances, amount to a "final decision". [Citations omitted]. We find that under the circumstances here there is subject-matter jurisdiction in the District Court.

Jones v. Califano, 576 F.2d 12, 19 (2nd Cir. 1978). *See also Kuehner v. Schweiker*, No. 82-1514 at 8-11 (3rd Cir. Slip. Op. filed Sept. 19, 1983); *Liberty Alliance of the Blind v. Califano*, 568 F.2d 333, 346 (3rd Cir. 1977); *De Lao v. Califano*, 560 F.2d 1384, 1388 (9th Cir. 1977).[14]

[14] The cases cited by the Secretary as standing for the proposition that exhaustion is still required even if the administrative process might not resolve the claims in the claimant's favor are inapposite. Brief for Petitioners at 43 n.30. The cases cited by the Secretary noted that relief might still have been available through the administrative process. Here, the Secretary insists that the payment ban is absolute. In addition, the cases involve claims for hospital reimbursement under a different administrative review scheme. Finally, the Secretary's cases do not involve claims by individual claimants that the benefit review procedures are illegal.

Furthermore, in *Mathews v. Eldridge*, 424 U.S. 319 (1975) this Court cautioned that "the core principal that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered remains applicable." *Id.* at 331 n.11. Plaintiffs' principal claim is that the Secretary's adherence to benefit review procedures requiring duplicative litigation violates 42 U.S.C. § 405(h) and denies due process of law. Thus, plaintiffs' principal claims rest on the proposition that it is exhaustion of the administrative remedy which causes the unlawful injury. *Mathews v. Eldridge*, 424 U.S. 319, 331 (1976); *Continental Can Co. v. Marshall*, 603 F.2d 590, 597 (7th Cir. 1979). As a result, if plaintiffs are forced to litigate their claims through the administrative process prior to seeking a judicial determination that the relitigation policy is unlawful, the injury will be complete and irremediable.

The Court of Appeals ruling that exhaustion "would fail to vindicate all the interests pressed by claimants even if the claimant won the appeal," 697 F.2d at 1296, is consistent not only with *Eldridge* but with numerous decisions of this Court and of the lower courts holding that exhaustion of administrative remedies is not required where "the plaintiff contends that the administrative system itself is unlawful or unconstitutional in form or application." *Patsy v. Florida International University*, 634 F.2d 900, 904 (5th Cir. 1981), *reversed on other grounds*, ____ *U.S.* ____, 102 S. Ct. 2557 (1982). *See also Barry v. Barchi*, 443 U.S. 55, 63 n.10 (1979) *quoting Gibson v. Berryhill*, 411 U.S. 564 (1973); *Continental Can Co. v. Marshall*, 603 F.2d 590, 597 (7th Cir. 1979); *Caswell v. Califano*, 583 F.2d 9, 13-15 (1st Cir. 1978); *Blankenship v. Secretary of HEW*, 587 F.2d 329, 332 (6th Cir. 1978).

Finally, plaintiffs' interest in prompt judicial review is predicated upon a vital interest in restoring their ability to function as viable human beings and often upon life or death concerns. The Secretary wholly ignores the fact that the BCBR Ruling—and the necessity of litigating to obtain benefits—often delays or precludes beneficiaries from obtaining medical

treatment for serious pulmonary disease. In another case where it was claimed that similar delay was of no consequence, this Court said:

> To allow a serious illness to go untreated until it requires emergency hospitalization is to subject the sufferer to the danger of a substantial and irrevocable deterioration in his health. Cancer, heart disease, or respiratory illness, if untreated for a year, may become all but irreversible paths to pain, disability, and even loss of life. The denial of medical care is all the more cruel in this context, falling as it does on indigents who are often without the means to obtain alternative treatment. [Footnote omitted].

Memorial Hospital v. Maricopa County, 415 U.S. 250, 261 (1974).

This case sadly demonstrates the realities anticipated in *Memorial Hospital*. Three of the six original named plaintiffs in this case have died since the complaint was first filed. The condition of one plaintiff who had not had BCBR at the time the case was initiated deteriorated while the action was pending to the point that BCBR had to be performed on an emergency basis. The Secretary stipulated in the District Court that another plaintiff would testify that BCBR has been prescribed to relieve "severe breathing difficulties" suffered as a symptom of "severe lung disease," but that he was unable to obtain BCBR because of inability to pay the cost of the treatment. J.A. at 32. Because of their physical condition, their age and their dependency upon the health insurance coverage provided by medicare, plaintiffs have raised at least a colorable claim that erroneous denial (and delay) in the payment of benefits will damage them "in a way not recompensable through retroactive payments." *Mathews v. Eldridge*, 424 U.S. 319, 331 (1976).

The Secretary has pointed to no interest in further exhaustion sufficiently compelling to overcome plaintiffs' interest in their life and health.[15]

Jurisdiction over this case is available under 42 U.S.C. § 405(g). The ruling of the Court of Appeals is consistent with *Weinberger v. Salfi*, 422 U.S. 749 (1975) and with *Mathews v. Eldridge*, 424 U.S. 319 (1976), and is dictated by this Court's holding in *Mathews v. Diaz*, 426 U.S. 67 (1976).

II. The Court Of Appeals Properly Held That Plaintiffs' Claims Fall Within The District Court's Mandamus Jurisdiction.

A. Mandamus Jurisdiction Under 28 U.S.C. § 1361 Is Not Precluded By 42 U.S.C. 405(h).

The Court of Appeals also held that plaintiffs' procedural claims may be considered under the mandamus statute, 42 U.S.C. § 1361. As in *Califano v. Yamasaki*, 442 U.S. 682, 698 (1979), it is unnecessary to determine the availability of mandamus jurisdiction because jurisdiction is available under 42 U.S.C. § 405(g).

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[15] This Court elsewhere has rejected the Secretary's suggestion that further proceedings should be required because they might lead to reconsideration of the Ruling:

> It is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context.

Mathews v. Eldridge, 424 U.S. 319, 330 (1976). Furthermore, the history of this case counsels against giving credence to the Secretary's claim. If adverse decisions from ten separate ALJs sitting in twenty-five consolidated cases, and the Appeals Council, do not cause the Secretary to revise her Ruling, the suggestion that an additional administrative appeal would prompt such action is incredible. In fact, the Ruling issued in response to this litigation absolutely requires ALJs and the Appeals Council to deny BCBR coverage based upon the very same 1978 government report relied upon by the Appeals Council, among other things, to rule that the medicare program must pay the costs of BCBR. *In re Ferguson*, No. 126-12-3830 at 18 (HHS Appeals Council, October 18, 1978).

However, consistent with the decision below, the Courts of Appeals have held that jurisdiction to review procedures employed by the Secretary of Health and Human Services exists under Section 1361 where the Secretary "owes the plaintiff a clear duty to act." *Ellis v. Blum*, 643 F.2d 68, 81 (2nd Cir. 1981) (Friendly, J.). *See also, Kuehner v. Schweiker*, 82-1514 (3rd Cir. Slip Op. filed Sept. 19, 1983); *Leschniok v. Heckler*, 713 F.2d 520, 522 (9th Cir. 1983); *Powderly v. Schweiker*, 704 F.2d 1093, 1095 (9th Cir. 1983); *American Ass'n of Councils of Medical Staffs of Private Hospitals, Inc. v. Califano*, 575 F.2d 1367, 1373 (5th Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); *Matos v. Secretary of H.E.W.*, 581 F.2d 282, 287 n.8 (1st Cir. 1978); *Barnett v. Califano*, 580 F.2d 28, 31 (2nd Cir. 1978); *Association of American Medical Colleges v. Califano*, 569 F.2d 101, 113 (D.C. Cir. 1977); *Elliott v. Weinberger*, 564 F.2d. 1219, 1227 (9th Cir. 1977); *Ryan v. Shea*, 525 F.2d 268, 271 (10th Cir. 1975); *Mattern v. Weinberger*, 519 F.2d 150, 156 (3rd Cir. 1975), *vacated on other grounds*, 425 U.S. 987 (1976); *Frost v. Weinberger*, 515 F.2d 57, 61-62 (2nd Cir. 1975), *cert. denied*, 424 U.S. 958 (1976); *Martinez v. Richardson*, 472 F.2d 1121, 1125-26 (10th Cir. 1973).[16]

Section 405 as originally enacted precluded the exercise of jurisdiction only under specific, clearly identified statutory provisions. *See* Respondents' Appendix at 2a.
Because the statutory grant of mandamus jurisdiction, 28 U.S.C. § 1361, did not exist at the time the Social Security Act's jurisdictional limitations were enacted, the authors of Section 405 could not have intended to proscribe jurisdiction under that provision. *Ellis v. Blum*, 643 F.2d 68, 81 (2nd Cir. 1981); *Elliott v. Weinberger*, 564 F.2d 1219, 1227 (9th Cir. 1977); *Aldrich v. Schweiker*, 555 F. Supp. 1080, 1085 n.4 (D. Vt. 1982).

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[16] Care should be taken to distinguish cases, including some arising in the social security context, where a *writ* of mandamus was denied because the party seeking the writ had failed to allege the traditional prerequisite to mandamus jurisdiction, *i.e.*, the existence of a judicially enforceable duty. *Compare, e.g., Hadley Memorial Hospital, Inc. V. Schweiker*, 689 F.2d 905, 912 (10th Cir. 1982); *Americana Healthcare Corp. v. Schweiker*, 688 F.2d 1072, 1083-87 (7th Cir. 1982); *Cervoni v. Secretary of Health Education & Welfare*, 581 F.2d 1010, 1019-20 (1st Cir. 1978) *with Roberts v. United States ex rel. Valentine*, 176 U.S. 221, 231 (1900) and the cases cited in the text.

However, at the time Section 405 was enacted, the United States District Court for the District of Columbia *did* possess mandamus jurisdiction over federal officials, a jurisdiction derived from Maryland common law and codified as early as 1801. The District of Columbia mandamus jurisdiction had been held to be an appropriate basis for challenges to administrative action long before Section 405 was enacted. *See, e.g., Stark v. Wickard,* 321 U.S. 288, 290 (1944); *Roberts v. United States,* 176 U.S. 221, 229-231 (1900); *West Coast Exploration Co. v. McKay,* 213 F.2d 582, 592 (D.C. Cir. 1954) (*en banc*), *cert. denied,* 347 U.S. 989 (1954); *United States ex rel. United States Borax Co. v. Ickes,* 98 F.2d 271 (D.C. Cir. 1938) and cases cited therein. The 1962 mandamus statute merely removed technical barriers to the exercise by all district courts of the historic equity jurisdiction traditionally exercised by the District of Columbia courts. Section 1361 did not create or confer previously unknown power on the federal courts. *See, e.g., Ellis v. Blum,* 643 F.2d 68, 80-81 (2nd Cir. 1981); *Peoples v. Dept. of Agriculture,* 427 F.2d 561, 564-65 (D.C. Cir. 1970).

The Second Circuit, relying on the historical background and the plain language of Section 405(h), accordingly has held:

> When Congress enacted § 405(h) in 1939, it did not bar the District of Columbia courts from issuing writs of mandamus against the Secretary's predecessor, and that when the power to issue such writs was decentralized in 1962, it did not then suddenly become subject to § 405(h)'s stricture.

Ellis v. Blum, 643 F.2d 68, 81 (2nd Cir. 1981). *See also, Kuehner v. Schweiker,* No. 82-1514 at 11 (3rd Cir. Slip Op. filed Sept. 19, 1983) (opinion for the court) and 27 (Becker, J., concurring); *Starnes v. Schweiker,* No. 82-1543 at 18-21 (4th Cir. Slip Op. filed Aug. 16, 1983); *Elliott v. Weinberger,* 564 F.2d 1219, 1227 n.12 (9th Cir. 1977). Furthermore, "[t]his conclusion is fortified by the knowledge that when Congress desired to prohibit actions in the nature of mandamus to review

decisions involving the dispensation of another type of federal disability benefit, it did so expressly." *Ellis v. Blum*, 643 F.2d 68, 81 n.14 (2nd Cir. 1981).[17]

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[17] The Secretary's suggestion that the Court infer that Section 405 precludes mandamus jurisdiction is directly contrary to the settled rule that a statute will not be read to preclude jurisdiction unless the intent to do so is specifically set forth or evident from clear and convincing evidence. There is simply no evidence anywhere of Congressional intent to subsume within section 405's proscriptions all further additions to Title 28's grants of jurisdiction. *Elliott v. Weinberger*, 564 F.2d 1219, 1227 n.12 (9th Cir. 1977). Indeed, one court has suggested that "[s]ince general mandamus jurisdiction did not even exist when Congress first enacted §405(h), the codifiers would have unjustifiably expanded the reach of §405(h) if they had added a clause barring actions under 28 U.S.C. §1361 to recover on a disability claim. *Aldrich v. Schweiker*, 555 F. Supp. 1080, 1085 n.4 (D. Vt. 1982).

Moreover, as Judge Friendly pointed out in *Ellis v. Blum*, 643 F.2d 68, 80 (2nd Cir. 1981), the legislative history of other pertinent statutory provisions confirms the view that section 405 does not limit the availability of mandamus jurisdiction at all. First, the legislative history of the 1976 amendment to 28 U.S.C. §1331, the federal question statute, expressly recognizes that "nonstatutory review of Federal administrative actions" under the mandamus statute and the common law jurisdiction of the District of Columbia courts supplements other available avenues of review. *Id., quoting* H. Rep. No. 94-1656, 94th Cong., 2d Sess. 15-16 (1976) U.S. Code Cong. & Adm. News 6121, 6136. Moreover, Congress in enacting the Administrative Procedure Act also expressly recognized the availability of mandamus relief as an alternative or supplement to statutory review provisions. In discussing the judicial review provisions of the APA, for example, the Attorney General noted that the section was intended to declare existing law concerning judicial review and stated:

> This subsection requires that where a specific statutory method is provided for reviewing a given type of case in the courts, that procedure shall be used. If there is no such procedure, or if the procedure is inadequate (i.e., where under existing law a court would regard the special statutory procedure as inadequate and would grant another form of relief), then any applicable procedure, such as prohibitory or mandatory injunction, declaratory judgment, or habeas corpus, is available.

Appendix to Attorney General's Statement Regarding Revised Committee Print of October 5, 1945, *reprinted* as Appendix B to S. Rep. No. 752, 29th Cong., Ist Sess. (1945), *reprinted in* Senate Committee on the Judiciary, Administrative Procedure Act: Legislative History, 79th Cong. 1944-46 230 (1946). In another portion of the Report the Committee explained that

(footnote continues)

B. Plaintiffs Have Alleged A Non-Discretionary Duty Sufficient To State A Cause Of Action Within The District Court's Mandamus Jurisdiction.

This case is appropriate for the exercise of mandamus jurisdiction because plaintiffs alleged that the Secretary violated specific statutory and constitutional duties. For example, plaintiffs alleged that the Secretary has an obligation under Section 405(h)—the very same section the Secretary asserts precludes jurisdiction here—to conform her benefit review procedures to the decisions of the Administrative Law Judges and the Appeals Council. The first sentence of that provision states:

> The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing.

42 U.S.C. § 405(h).[18] It has been held that "the obvious purpose of [Section 405(h)] is to declare that res judicata principles are applicable to the findings and decisions of the

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(footnote continued)

nonstatutory review through prohibitory or mandatory injunction or declaratory judgment, for example, "may be operative before statutory forms of review are available; and in a proper case it may be utilized to determine the validity or application of agency action." S. Rep. No. 752, 79th Cong. 1st Sess. (1945), *reprinted in*, Senate Commitee on the Judiciary, Administrative Procedure Act: Legislative History 79th Cong. 1944-46 212 (1946). Thus, the evidence suggests that Congress historically has recognized the availability of non-statutory and common law forms of review—including "mandatory injunctions"—despite provisions for statutory review where such statutorily prescribed forms of review were either unavailable or insufficient.

[18] The Secretary's argument that because the Appeals Council stated that the *Ferguson* decision is not precedential, the decision also must be denied res judicata effect is wrong. The Secretary ignores the plain language of Section 405(h). The Secretary also confuses precedential *value* with collateral estoppel *effect*. Courts generally recognize that even if a decision or ruling has no precedential value it nonetheless may preclude relitigation of the issues previously decided. The rules of many of the Courts of Appeals explicitly recognize the difference between precedential value and collateral estoppel effect. In pertinent part Ninth Circuit Rule 21(c) states:

> A disposition which is not for publication shall not be regarded as precedent and shall not be cited to or by this court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders, *except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.*

(footnote continues)

SSA made in certain procedural contexts." *Stuckey v. Weinberger*, 488 F.2d 904, 909 (9th Cir. 1973) (footnote omitted). *Cf. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, Inc.*, 402 U.S. 313, 339-342 (1971). The Secretary plainly has no discretion to ignore the statutory mandate.[19]

In addition, the complaint alleges that the Secretary has a constitutional duty under the due process clause to conform her claims review process to the decisions of the Administrative Law Judges and the Appeals Council. The Courts of Appeals have held that federal agencies are bound by precisely the constitutional duty alleged by plaintiffs. *Ellis v. Blum*, 643 F.2d 68, 81 (2nd Cir. 1981) ("[I]t would strain belief to think that Congress meant to require a plaintiff to forego mandamus and resort to prolonged § 405 procedures where a clear duty in the defendant to pay disability benefits, *e.g.*, a prior judgment, had been demonstrated."); *Jones v. Califano*, 576 F.2d 12, 18 (2nd Cir. 1978) ("[T]he Secretary's refusal to follow the rulings of

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(footnote continued)

Rule 21(c), Ninth Circuit Rules (emphasis added).

See also Rule 8(f), District of Columbia Circuit Rules (unpublished orders are "not to be cited . . . as precedents" but may be referred to "for such purposes as application of the doctrines of res judicata, collateral estoppel and law of the case, which turn on the binding effect of the judgment, and not on its quality as precedent."); Rule 18(d)(ii), Fourth Circuit Rules; Rule 25.4, Fifth Circuit Rules; Rule 25(b) Sixth Circuit Rules; Rule 8(i), Eighth Circuit Rules.

[19] The Secretary misstates the nature of this case and the relief plaintiffs seek by arguing that only questions involving her "judgment and discretion and the weighing of available data and other evidence" are at issue here. Brief for Petitioner at 36. The Secretary argues, for example, that mandamus jurisdiction is an inappropriate basis for a challenge to her discretionary decision not "to make payment for BCBR." *Id.* Plaintiffs do not challenge in this case the validity of the Secretary's conclusions regarding the medical evidence on BCBR—the Appeals Council already has rejected the Secretary's conclusions—nor do they seek the payment of benefits. The nondiscretionary duty alleged by plaintiffs is the Secretary's duty to conform her claims review procedures to the requirements of law. It would be unreasonable for the Secretary to suggest that the second and third sentences of Section 405(h) are mandatory and judicially enforceable, but that the res judicata principles contained in the first sentence of the same section are merely advisory and not subject to judicial enforcement.

his own Appeals Council raises colorable questions of equal protection and due process."); *Continental Can Co. v. Marshall*, 603 F.2d 590 (7th Cir. 1979).[20]

The duties alleged by respondents have been recognized and enforced by the courts in virtually identical circumstances and plainly are sufficient to bring this action within the District Court's mandamus jurisdiction.[21]

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[20] The Secretary's argument that no duty arises inasmuch as the BCBR policy was rejected in cases involving claimants other than plaintiffs is refuted by the holdings of this Court abrogating the doctrine of mutuality of estoppel. *Montana v. United States*, 440 U.S. 147 (1979); *Parklane Hosiery Co v. Shore*, 439 U.S. 322 (1979). *See also, Starker v. United States*, 602 F.2d 1341 (9th Cir. 1979). The Secretary was a party to the cases before the ALJs and she actively litigated the cases before the Appeals Council. In these circumstances plaintiffs' allegations are sufficient to state a colorable claim that the Secretary is obliged to adhere to the decisions of the ALJs and the Appeals Council. Plaintiffs do not contend that the Secretary is bound forever by the Appeals Council and ALJ decisions. If the Secretary obtains evidence refuting the holding of the Appeals Council and the ALJs, the Secretary would be free to reopen the issue under traditional principles. *See, e.g., Continental Can Co. v. Marshall*, 603 F.2d 590, 595 n.7 (7th Cir. 1978).

[21] Petitioner's alternative argument—that the second sentence of Section 405(h) bars mandamus jurisdiction even if the third does not—is wholly without merit. Insofar as this case is concerned the sentence states that no findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or government agency except as herein provided. The Court of Appeals decision plainly does not authorize mandamus to review findings of fact or a decision by the Secretary denying benefits. Instead, the ruling expressly limits the availability of mandamus to procedural questions. *Ringer v. Schweiker*, 697 F.2d 1291, 1293-94 (9th Cir. 1982.). *See also, Ellis v. Blum*, 643 F.2d 68, 81 (2nd Cir. 1981) (Mandamus jurisdiction poses no threat to the system of review provided in Sections 405(g) and (h) because "factual disputes are not amenable to the mandamus remedy").

III. The Court Of Appeals Ruling That Plaintiffs' Claims May Be Heard Under 28 U.S.C. § 1331 Is Consistent With Prior Decisions Of This Court.

Because 42 U.S.C. § 405 establishes a jurisdictional base irrespective of whether plaintiffs' claims are characterized as claims for benefits or as procedural claims, it is unnecessary to consider the Secretary's argument that the Court of Appeals mischaracterized such claims as procedural and erroneously asserted federal question jurisdiction, 28 U.S.C. § 1331. *See, e.g., Califano v. Yamasaki*, 442 U.S. 682, 698 (1978). However, the differences between the present case and *Salfi* and *Eldridge* demonstrate that the Court of Appeals characterization of plaintiffs' principal claims as procedural in nature was correct and that federal question jurisdiction was properly asserted.

The significance of characterizing plaintiffs' lawsuit as an action to recover Medicare "benefits" derives solely from the language of 42 U.S.C. § 405(h). Section 405 restricts federal question jurisdiction only insofar as the plaintiff seeks "to recover on any claim" arising under the Medicare Act. 42 U.S.C. § 405(h). Thus, if the action is not one "to obtain payments pursuant to the Medicare Act," *St. Louis University v. Blue Cross Hospital Service*, 537 F.2d 283, 289, 291-92 (8th Cir.), *cert. denied*, 429 U.S. 977 (1976), and the "plaintiff here is not merely seeking relief which is substantially equivalent to an award of money damages," *Griffin v. Richardson*, 346 F. Supp. 1226, 1230 (D. Md.), *aff'd*, 409 U.S. 1069 (1972), the action is not one brought to recover on a claim and therefore is not subject to the restrictions imposed by Section 405(h). *See also, Attorney Registration and Disciplinary Comm'n v. Schweiker*, No. 83-1132 at 6 (7th Cir. Slip Op. filed August 11, 1983); *Leschniok v. Heckler*, 713 F.2d 520, 522 (9th Cir. 1983); *Humana of South Carolina, Inc. v. Califano*, 590 F.2d 1070, 1080 (D.C. Cir. 1978), *Elliott v. Weinberger*, 564 F.2d 1219,

1227 n.11 (9th Cir. 1977). *Cf. Wright v. Califano*, 587 F.2d 345, 349-50 (7th Cir. 1978), *White v. Mathews*, 559 F.2d 852, 856 (2nd Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).[22]

As the Court of Appeals recognized, the "major thrust" of the complaint is "first and foremost, to invalidate the Secretary's procedure." 697 F.2d at 1294. Indeed, in the Court of Appeals the Secretary expressly acknowledged that plaintiffs "do not pray for the payment of money." Appellant's Brief at 14. Plaintiffs' eligibility for Medicare benefits will be determined only in subsequent administrative or judicial proceedings, and a favorable ruling by the District Court will not dictate the result in those proceedings.

In *Mathews v. Eldridge*, this Court described a claim which Section 405(h) did not bar as "collateral" to benefit claims which would be precluded. 424 U.S. at 330. As one court recently has noted, the *Eldridge* approach to collaterality "is a pragmatic one," *Kuehner v. Schweiker*, No. 82-1514 at 18 (3rd Cir. Slip Op. filed Sept. 19, 1983) (Becker, J., concurring), and such claims are readily identifiable. First, a claim is collateral where, as here, it involves "the right to have correct procedures followed *before* the request [for benefits is considered]," *Heckler v. Lopez*, No. A-145 at 5 (Slip Op. filed Oct. 11, 1983) (Stevens, J., dissenting) (emphasis in original). *See also*

[22] Comparison of the nature of the relief sought by plaintiffs with the relief sought in *Weinberger v. Salfi*, 422 U.S. 749 (1975) and *Mathews v. Eldridge*, 424 U.S. 319 (1976) demonstrates the fallacy of the Secretary's contention that the Court of Appeals ruling is inconsistent with the decisions of this Court. In both *Salfi* and *Eldridge* the plaintiffs sought and received relief from the lower courts which included the immediate right to payment of benefits under the Social Security Act—benefits which they otherwise never would have received. 422 U.S. at 755; 424 U.S. at 325 n.3. Indeed, this Court's decision in *Salfi* emphasized that the jurisdictional restrictions of 42 U.S.C. § 405(h) applied because "it is Social Security benefits which appellees seek to recover." 422 U.S. at 760. *See also id.* at 755, 761. In *Eldridge*, while plaintiff challenged the Secretary's procedures, he also claimed an immediate right to payment of benefits under the Social Security Act. 424 U.S. at 325.

Mathews v. Eldridge, 424 U.S. 319, 330 (1976); *Ellis v. Blum*, 643 F.2d 68, 77, 82 n.15 (2nd Cir. 1981). Second, the claim is collateral where, as here, should plaintiffs prevail, the Secretary nevertheless would be at liberty to deny reimbursement in appropriate cases, so long as lawful procedures were employed. *See, e.g., Kuehner v. Schweiker*, No. 82-1514 at 21 (3rd Cir. Slip Op. filed Sept. 19, 1983) (Becker, J., concurring). Plaintiffs' "procedural" claims are "collateral" to any claim for benefits and therefore are not precluded by Section 405(h).

The complaint also alleges that the Secretary's relitigation policy and her failure to conform her claims review process to the decisions of her ALJs and of the Appeals Council deprive plaintiffs of due process of law. *See Ringer v. Schweiker*, 697 F.2d 1291, 1293 (9th Cir. 1982). Such a constitutional claim clearly is substantial and is not subject to any administrative exhaustion requirement created by the Secretary. *See, e.g., Jones v. Califano*, 576 F.2d 12, 18 (2nd Cir. 1978); *Continental Can Co. v. Marshall*, 603 F.2d 590, 596-97 (7th Cir. 1979). *See also, Kuehner v. Schweiker*, No. 82-1514 at 8 (3rd Cir. Slip Op. filed Sept. 19, 1983), *citing Liberty Alliance of the Blind v. Califano*, 568 F.2d 333, 345-46 (3rd Cir. 1977). The Secretary appears to concede that the District Court retains federal question jurisdiction to decide colorable constitutional claims not necessarily affecting entitlement to benefits. Brief for the Petitioner at 28 n.18. *See also Schweiker v. McClure*, 456 U.S. 188 (1982); *St. Louis University v. Blue Cross Hospital Service*, 537 F.2d 283, 291-93 (8th Cir. 1976); *Ellis v.Blum*, 643 F.2d 68, 77 (2nd Cir. 1981).

Plaintiffs also challenge the failure of the Secretary to promulgate the BCBR Ruling in accordance with the procedural requirements of the Administrative Procedure Act. It is settled that Section 1331 jurisdiction is available over such a claim "to vindicate an interest in procedural regularity." *Humana of South Carolina, Inc. v. Califano*, 590 F.2d 1070, 1080 (D.C. Cir. 1978). *See also, National Assn. of Home Health Agencies v. Schweiker*, 690 F.2d 932, 937 (D.C. Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 1193 (1983); *Daniel Freeman Memorial Hospital v. Schweiker*, 656 F.2d 473, 476

(9th Cir. 1981).[23] Again, these claims were sufficient to accord the District Court jurisdiction over the complaint.

Because granting the relief sought by plaintiffs in this case will not result in the payment of benefits, this action is not one "to recover on any claim" under the Medicare Act and not subject to the restrictions of 42 U.S.C. § 405(h).

IV. The Secretary's Claim That The Court Of Appeals Decision Will Disrupt The Administration Of The Medicare Program Is Erroneous.

Throughout her brief the Secretary argues that complete preclusion of judicial review even of her procedures is necessary to avoid substantial disruption in the administration of the medicare program. Rather than demonstrating why this Court should foreclose judicial review, the Secretary's protestations—considered in light of recent developments—actually demonstrate why judicial review must be available in cases such as the present one.

At the time the Petition for Writ of Certiorari was filed, this case appeared to be a virtually unique instance in which an administrative agency refused to adhere to the consistent rulings of its own ALJs. Since that time, however, it has become clear that the substantive and jurisdictional issues raised in this case are far from unique. This case, rather than representing an isolated instance of bureaucratic schizophrenia, now seems to involve merely one application of the Secretary's policy of ignoring administrative and judicial decisions with which she disagrees.

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[23] The Secretary's argument that her policy to follow the notice and comment procedures of the Administrative Procedure Act in matters relating to Social Security benefits, announced in the *Federal Register*, 36 *Fed. Reg.* 2532 (1971) "is internal only and not judicially enforceable," Petitioner's Brief at 32 n.23, is frivolous and has been rejected by the courts. *Rodway v. Department of Agriculture*, 514 F.2d 809, 814 (D.C. Cir. 1975); *Lewis v. Weinberger*, 415 F. Supp. 652, 661 (D.N.M. 1976); *Florida v. Weinberger*, 401 F. Supp. 760, 761 (D.D.C. 1975). *See also, Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *Service v. Dulles*, 354 U.S. 363, 386-88 (1957); *United States ex rel Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954).

Several recent cases highlight the Secretary's challenge to the authority of the courts and ALJs. In *Jones v. Califano*, 576 F.2d 12 (2nd Cir. 1978) plaintiffs challenged the Secretary's continued adherence to a benefit determination policy which the ALJs and the Appeals Council had rejected on four occasions. Here, of course, the Secretary ignores 170 adverse decisions rendered in twenty-six consolidated cases by ten different ALJs (not including the Appeals Council). In *Leschniok v. Heckler*, 713 F.2d 520 (9th Cir. 1983) the Secretary refused to recognize a plainly stated provision of the Social Security Act and ordered her ALJs to "ignore this express statutory command." *Id.* at 523. In *Kuehner v. Schweiker*, No. 82-1514 (3rd Cir. Slip Op. filed Sept. 19, 1983), the Secretary instructed her ALJs to follow a policy of "nonacquiescence" in certain judicial rulings which struck down her policy regarding termination of Social Security disability benefits. *Id.* at 9-10. In two recent Vermont cases it was alleged that, as here, claimants were forced "to pursue lengthy administrative appeals because the Secretary persists in promulgating standards for eligibility that are contrary to the law of the circuit." *Aldrich v. Schweiker*, 555 F. Supp. 1080, 1082-84, 1088 (D. Vt. 1982); *Spear v. Harris*, No. 80143 at 7 (D. Vt. Slip. Op. filed July 31, 1980). Most recently, in *Lopez v. Heckler*, the District Court for the Central District of California granted a preliminary injunction against the Secretary's announced policy of "nonacquisence" in not one, but two decisions of the Ninth Circuit. *See Lopez v. Heckler*, No. 83-697-WPG(T) (C.D. Cal. Slip Op. filed June 18, 1983), *stay granted, Heckler v. Lopez*, 52 U.S.L.W. 3187 (Sept. 20, 1983) (Rehnquist, Circuit Justice), *refusing to vacate stay*, No. A-145 (Order entered October 11, 1983).

The Secretary has been charged by Congress with the responsibility of administering programs designed to provide needed medical assistance to the elderly, the poor and the disabled, for whom Social Security benefits are often a matter of life and death. The effect of the Secretary's policy of "nonacquiesence" falls most heavily on persons least able to bear the deprivation of Social Security assistance, and least able to challenge the Secretary's illegal action. As a result, one must

wonder whether other unreported instances exist in which the Secretary has elected to ignore the repeated rulings of the judiciary or the ALJs. It bears repeating that in this case alone the Secretary's stubborn adherence to her relitigation policy has precluded two of the six named plaintiffs from obtaining medicial treatment prescribed for symptomatic relief of their severe pulmonary diseases notwithstanding the Appeals Council's *Ferguson* decision and over 170 ALJ rulings rejecting that very policy.

In this case, and in others like it, it seems certain that elderly, ill and disabled citizens who Congress intended to benefit from Social Security Act programs actually have suffered financially as well as physically, because the Secretary deprived them of statutory rights to which the courts and the ALJs consistently rule they are entitled. *See, e.g., Heckler v. Lopez*, No. A-145 at 4 (Slip Op. filed Oct. 11, 1983) (Brennan, J., dissenting); *Leschniok v. Schweiker*, 713 F.2d 520, 522-23 (9th Cir. 1983). The ultimate issue in this case is not the Secretary's position on BCBR. The real issue before the Court is the integrity of the administrative review process and the authority of the courts to interpret and enforce the law. Congress simply could not have intended to preclude judicial review where the effect of such preclusion is to insulate the Secretary's deliberate violations of law from scrutiny and correction.

CONCLUSION.

The Secretary's insistence that elderly and disabled Medicare beneficiaries must litigate repeatedly issues which she has lost in nearly 200 cases is both unlawful and fundamentally unjust. The Court of Appeals holding will permit the District Court to correct the injustice. The Judgment of the Court below should be affirmed.

Respectfully submitted,

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October, 1983

APPENDIX A

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. §1331 *as amended* by Pub. L. 94-574, §2, 90 Stat. 2721 (1976); Pub. L. 96-486, §2(a), 94 Stat. 2369 (1980) provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

2. 28 U.S.C. § 1361 provides:

The district courts shall have original jursidiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

3. Sections 205(g) and (h) of the Social Security Act, as codified at 42 U.S.C. §§ 405(g) and (h), provide in relevant part:

(g) Judicial review

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or with such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifiying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive.

* * *

(h) Finality of Secretary's decision

The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under sections 1331 or 1346 of title 28 to recover on any claim arising under this subchapter.*

* The provision set forth above reflects Section 405(h) as presently codified. Prior to the 1948 Revision of the Judicial Code the final sentence of § 405(h) read: "No action against the United States, the Board, or any officer or employee thereof shall be brought under section 24 of the Judicial Code of the United States to recover on any claim arising under this title." Social Security Act Amendments of 1939, Pub. L. No. 76-379, §205(h), 53 Stat. 1360, 1371 (1939). Section 24 of the Judicial Code was repealed by Act of June 25, 1948, Pub. L. No. 80-773, §39, 62 Stat. 869, 992 (1948).

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[illegible] L. STEVAS.
CLERK

No. 82-1772

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

FREEMAN H. RINGER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondents urge this Court to fashion several substantial loopholes in the special statutory procedures Congress has provided for the administrative and judicial review of the millions of Social Security claims filed each year. Their submission, however, is flatly inconsistent with this Court's decision in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), and its progeny, with the text and legislative history of the Social Security Act, and with the consistent administrative interpretation and implementation of 42 U.S.C. (& Supp. V) 405 since it was enacted in 1939.

The exhaustion requirements and limitations on judicial review that respondents seek to avoid were imposed by Congress and the Secretary to further the purposes of the Social Security program as a whole. These provisions promote efficiency, fairness, and uniformity of decisionmaking[1]; they fulfill the responsibility of the Secretary to inquire fully into each claim[2]; and they minimize

[1] See Gov't Br. 18, 23-30, 34-37, *Heckler* v. *Day*, No. 82-1371.

[2] *Heckler* v. *Campbell*, No. 81-1983 (May 16, 1983), slip op. 10-11 & n.12; *id.* at 1-2 (Brennan, J., concurring); *id.* at 1 (Marshall, J., concurring and dissenting). See also *Richardson* v. *Perales*, 402 U.S. 389, 410 (1971).

the burden on the courts and prevent premature judicial interference into matters entrusted to the Secretary by assuring an opportunity for the agency to correct its own errors, apply its experience and expertise, and compile a record adequate for judicial review.[3]

The arguments respondents seek to raise in this action outside the special statutory review procedures all can be raised on judicial review under 42 U.S.C. (Supp. V) 405(g) of a "final decision" denying their claims for benefits for BCBR surgery. Moreover, the Secretary's procedures accommodate the very interest respondents advance in this case—the desire of some claimants to expedite judicial review—by permitting the ALJ hearing and Appeals Council stages to be expedited or dispensed with entirely if the claimant and the Secretary agree that these steps are unnecessary. Respondents, however, did not attempt to invoke those provisions.[4] Thus, even putting legal obstacles to one side, there is no policy justification for the judicially fashioned exceptions respondents seek.

Respondents' position also presents enormous practical difficulties. The efficient review of millions of Social Security claims each year depends on the ability of the Secretary and the courts to enforce governing procedural rules easily and uniformly in *all* cases, without the need to litigate concerning their wisdom and applicability in individual cases. Acceptance of respondents' arguments for circumventing the statutory review procedures would substantially disrupt the orderly administrative and judicial review of Social Security claims and accelerate the recent proliferation of extensive and wasteful litigation in the lower courts on threshold questions of jurisdiction and exhaustion of administrative remedies.

1. Respondents' broad submission that the district court had jurisdiction in this case under one or another of several theories (Resp. Br. 12-29) is directly contrary

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[3] *Weinberger* v. *Salfi*, 422 U.S. at 765.

[4] See Gov't Br. 4-5, 39-44; S. Doc. 10 (Pt. 3), 77th Cong., 1st Sess. 43 (1941).

to the text of the Social Security Act, which expressly precludes jurisdiction over this case on any basis.[5] Congress has provided that a person may obtain judicial review of the administrative denial of a claim for benefits under Part A of the Medicare Program only if the Secretary first has rendered a "final decision" on the claim "after [a] hearing," and only if the amount in controversy is $1000 or more. 42 U.S.C. 1395ff(b) and 42 U.S.C. (Supp. V) 405(g). To underscore that this is the exclusive means for obtaining judicial review, Congress provided in 42 U.S.C. 405(h) that "[n]o findings of fact or decision of the Secretary shall be reviewed by any * * * tribunal * * * except as herein provided"—*i.e.*, except as provided in 42 U.S.C. 1395ff(b) and 42 U.S.C. (Supp. V) 405(g). And Congress further provided in 42 U.S.C. 405(h) that "[n]o action" to recover on any claim arising under the Social Security Act may be brought under Section 41 of Title 28 of the United States Code, which, at the time 42 U.S.C. 405(h) was enacted, contained all of the general grants of jurisdiction to federal district courts. *Salfi*, 422 U.S. at 756 n.3.

It is difficult to see how Congress could more clearly have expressed its intent to channel all challenges to a preliminary decision by the Secretary denying a claim—whether those challenges are constitutional, statutory, regulatory, procedural, or evidentiary in nature—through the special statutory review procedure in 42 U.S.C. 1395ff (see *Salfi*, 422 U.S. at 762, 765-767) and to require that the claimant complete all of the administrative steps of that procedure before seeking judicial review. "[A]bsent a clearly expressed legislative intention to the contrary, [this statutory] language must ordinarily be regarded as conclusive." *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102,

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[5] We confine our discussion in the text to the claims of respondents Holmes, Webster-Zieber and Vescio. They are the only three respondents who actually underwent BCBR surgery and filed applications for benefits under the Medicare Program for that surgery, and they therefore are the only three who satisfied the "nonwaivable" requirement for jurisdiction under 42 U.S.C. 405(g). See Gov't Br. 37 n.26; *Weinberger* v. *Salfi*, 422 U.S. at 764; *Mathews* v. *Eldridge*, 424 U.S. 319, 328-329 (1976).

108 (1980). Respondents point to no indication whatever of a "legislative intention to the contrary," and in fact the limited legislative history of 42 U.S.C. 405 indicates that Congress meant exactly what it said.[6] The text of the Act therefore conclusively refutes respondents' contentions that the district court had jurisdiction in this case under 42 U.S.C. 1395ff(b) and 42 U.S.C. (Supp. V) 405(g) even though they had not completed all of the administrative steps of the statutory review procedure, and that they could in any event separate out certain "procedural" issues relating to the interlocutory decisions denying their claims and obtain immediate judicial review of those issues in an action brought under 28 U.S.C. (Supp. V) 1331 or 28 U.S.C. 1361.

It also is significant that when Congress has intended to permit judicial review on a particular question of law or the validity of a regulation involved in a claim for benefits before the entire claim has been disposed of by a "final decision" at the administrative level, it has expressly so specified in the Social Security Act itself. Under 42 U.S.C. 1395*oo*, a provider of services under Medicare may obtain review of its reimbursement claim by the Provider Reimbursement Review Board in HHS, and the Board's "final decision" in turn is subject to judicial review. See Gov't Br. 5-6. Congress amended this Section in 1980 to permit a provider to obtain immediate judicial review of a "question of law or regulations" without first obtaining a "final decision" by the Board

[6] Both committee reports, in explaining the preclusion of review in 42 U.S.C. 405(h), state that "there shall be no review of the Board's decisions by any person, tribunal, or governmental agency except as provided in subsection (g)." S. Rep. 734, 76th Cong., 1st Sess. 52 (1939); H.R. Rep. 728, 76th Cong., 1st Sess. 43-44 (1939). The reports discuss the "final decision" requirement in 42 U.S.C. 405(g) essentially by paraphrasing the statutory language. Like Section 405(g) itself, however, they refer to the possibility that the validity of a regulation affecting procedural matters might be at issue on judicial review, without suggesting that review of the regulation itself or the procedural issues it addresses would be available prior to the rendering of a final decision on an individual claim for benefits. S. Rep. 734, at 52; H.R. Rep. 728, at 43.

on the entire reimbursement claim if the Board determines that it is without authority to resolve the legal issue. 42 U.S.C. (Supp. V) 1395*oo*(f)(1). The legislative history shows that Congress fully understood that without this statutory exception, the Board would be required to render a final decision on the entire claim before the provider could obtain judicial review, even though the Board would be bound by the regulation or provision of law involved. H.R. Rep. 96-1167, 96th Cong., 2d Sess. 394 (1980). Congress did not, however, create an exception to the identical "final decision" requirement in 42 U.S.C. (Supp. V) 405(g) and 42 U.S.C. 1395ff(b) to permit a beneficiary to obtain interlocutory judicial review on a question of law or regulations, as respondents seek to do here. "In the context of the statute's precisely drawn provisions, this omission provides persuasive evidence that Congress deliberately intended to foreclose" such a right. *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982).[7]

2. Contrary to respondents' and amici's apparent contentions (Resp. Br. 14 n.12; Am. Br. 27-28, 38-39), the consistent administrative interpretation and implementation of Section 405 firmly supports the construction its plain language requires. The Social Security Board's January 1940 report regarding the manner in which 42 U.S.C. 405 would be implemented (see *Salfi*, 422 U.S. at

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[7] Moreover, when Congress enacted the exception to the "final decision" requirement in 42 U.S.C. (Supp. V) 1395*oo*(f)(1), it provided for expedited judicial review *within* the special statutory review procedure, not in a separate action under 28 U.S.C. (Supp. V) 1331 or 28 U.S.C. 1361, as respondents urge here (Resp. Br. 19-29). And even this exception mandates a form of exhaustion by requiring that the claimant first present the question to the Board so that the Board can determine whether the provision of law or regulation in fact is involved in the case and is beyond its authority to resolve. It therefore is untenable to suppose, as respondents also urge, that Congress intended to permit a beneficiary to obtain immediate judicial review under 42 U.S.C. 1395ff(b) and 42 U.S.C. (Supp. V) 405(g) of an interlocutory decision denying a claim without even presenting the matter to an ALJ or the Appeals Council. Compare Gov't Br. 43-44.

759-760 n.6; *id.* at 790-792 (Brennan, J., dissenting)) made clear that the Appeals Council would be an essential step in the administrative process; that only a decision by the Appeals Council would constitute the Board's "final verdict" on a claim; and that the Board construed the Act to provide that a decision would not be "final" for purposes of judicial review until completion of any proceedings the Secretary deemed necessary after a hearing. S. Doc. 10 (Pt. 3), 77th Cong., 1st Sess. 38-39, 51-53 (1941). Accordingly, regulations implementing 42 U.S.C. 405 made clear from the outset that judicial review could be obtained only after the claimant had sought review from the Appeals Council. 5 Fed. Reg. 4169, 4171-4174 (1940) (adopting 20 C.F.R. 403.706(c), 403.708(g), 403.709(*l*), and 403.710(e)).

Consistent with this practice, the regulations in effect when Congress enacted the Medicare Program in 1966 likewise made clear that a decision denying a claim would be subject to judicial review under 42 U.S.C. 405(g) only after the hearing required by 42 U.S.C. 405(b) and Appeals Council review. 20 C.F.R. 404.908, 404.916, 404.940 and 404.951 (1966).[8] Against this background, Congress's specification in 42 U.S.C. 1395ff(b) that a Medicare Part A beneficiary is entitled to a hearing "as provided in section 405(b)" and judicial review of the final decision after that hearing "as provided in section 405(g)" must be viewed as a ratification of the exhaustion requirement in the then-existing regulations and approval of its application to Part A Medicare claims. *Haig* v. *Agee*, 453 U.S. 280, 297-299 (1981); *Lorillard* v. *Pons*,

[8] Thus, contrary to respondents' contention (Resp. Br. 14 n.12), we do not argue that the particular regulation promulgated in 1980 stating that a final decision will have been rendered only after Appeals Council review (20 C.F.R. 404.900(a)(5) (1979)) set forth a *new* definition of finality. That provision did not make a substantive change. See 44 Fed. Reg. 20176, 20178 (1979). The Court recognized in *Salfi* that under the prior regulations, "the finality required for judicial review [was] achieved only after the further steps of a hearing before an administrative law judge and, possibly, consideration by the Appeals Council" (422 U.S. at 765).

434 U.S. 575, 580-581 (1978). Furthermore, Congress plainly did not contemplate that the exhaustion requirement could be circumvented by bringing an action under 28 U.S.C. 1331 or 1361, as respondents urge (Resp. Br. 19-29). The legislative history of the Medicare Act makes clear that "[*i*]*t is intended that the remedies provided by* [*the statutory*] *review procedures shall be exclusive.*" *United States* v. *Erika, Inc.*, 456 U.S. 201, 209 n.11 (1982) (quoting S. Rep. 404, 89th Cong., 1st Sess. 54-55 (1965) (emphasis added by the Court)).

3. In the face of these overwhelming obstacles, respondents nevertheless contend (Resp. Br. 12-16) that they were entitled to immediate judicial review under 42 U.S.C. 1395ff(b) and 42 U.S.C. (Supp. V) 405(g) of the denial of their claims at the reconsideration level because the October 1980 HCFA ruling barring payment for BCBR surgery indicated that further exhaustion of their administrative remedies would be futile and that " 'the Secretary will treat as final any denial of benefits for the BCBR surgery' " (Resp. Br. 16 (quoting Pet. App. 8a)). This contention is plainly incorrect, both factually and legally.

Contrary to respondents' assertion, the Secretary in fact has not "treat[ed] as final" any denial of benefits for BCBR at the reconsideration stage. She has continued to provide for the ALJ and Appeals Council review that the Act and her own regulations require. Moreover, respondents once again ignore the fact that the formal HCFA ruling they challenge does not even apply to the only three respondents who filed a claim for benefits, because all three had the surgery before the effective date of that ruling. Gov't Br. 13, 45. The ALJ's thorough consideration of pre-October 1980 BCBR claims without regard to the 1980 HCFA ruling and the Appeals Council's subsequent decision to grant review of such claims on the merits (Gov't Br. 13, 14 n.8) renders frivolous respondents' assertion that the 1980 ruling indicated that exhaustion of administrative remedies would be futile.

The more fundamental flaw in respondents' argument, however, is their assumption that a court may excuse the exhaustion of administrative remedies required by 42 U.S.C. 1395ff(b) and 42 U.S.C. (Supp. V) 405(g) based on its own assessment that exhaustion would be futile. This Court explicitly held in *Salfi* that although the statutory scheme does not bar the *Secretary* from determining that full internal exhaustion is not necessary in order for her to deem an otherwise interlocutory decision to be administratively "final" for purposes of judicial review (422 U.S. at 766-767), "a court may not substitute its conclusion as to futility for the contrary conclusion of the Secretary" (*id.* at 767 (emphasis added)). See also *Heckler* v. *Lopez*, No. A-145 (Sept. 9, 1983), slip op. 8 (Rehnquist, Circuit Justice).

The Court reiterated this holding in *Mathews* v. *Eldridge*, *supra*, observing that "under § 405(g) the power to determine when finality has occurred ordinarily rests with the Secretary since ultimate responsibilty for the integrity of the administrative program is his." 424 U.S. at 330.[9] Similarly, the Court stated in *Mathews* v. *Diaz*, 426 U.S. 67, 76 (1976) (emphasis added), that it had "held in *Salfi* that the *Secretary* could waive the exhaus-

[9] Respondents and amici rely (Resp. Br. 19 n.15; Am. Br. 23, 31 n.6) on a passage in *Eldridge* in which the Court observed that although the Secretary had authority to determine the timing and content of the procedures that provided for termination of benefits before a hearing was held, "[i]t is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context." 424 U.S. at 330. This passage, however, addressed the question whether the claimant had satisfied the "nonwaivable" requirement of submitting a claim to the Secretary. See 424 U.S. at 329-330. The Court's discussion of the "waivable" exhaustion requirement, at issue here, commenced with the *succeeding* paragraph, in which, as noted in the text, the Court reiterated the *Salfi* holding that the power to determine when finality has occurred rests with the Secretary. 424 U.S. at 330. The quoted passage therefore lends no support to respondents' assertion that a court may excuse exhaustion based on its own conclusion that exhaustion would be futile.

tion requirements which [42 U.S.C. 405(g)] contemplates and that he had done so in that case." The Court noted that in *Salfi* it had interpreted the Secretary's failure to challenge the sufficiency of the allegations of exhaustion "as a determination *by the Secretary* that exhaustion would have been futile and deferred to his judgment that the only issue presented was the constitutionality of a provision of the Social Security Act" (426 U.S. at 76 (emphasis added)). The Court explicitly based its holding in *Diaz* on "[t]he same reasoning" (*ibid.*). Thus, contrary to respondents' assertion (Resp. Br. 12-16; see also Am. Br. 21-25, 27-31, 36-39), no decision of this Court suggests that a court may excuse exhaustion based on its own conclusion that exhaustion would be futile.

4. Contrary to respondents' and amici's contention (Resp. Br. 12-15; Am. Br. 21-23, 27-29), it also is clear that the Secretary cannot be held in this case to have "waived" the need for full exhaustion of administrative remedies under the rationale of *Salfi* and *Diaz*. Those cases both involved the unique circumstances of a challenge to the constitutionality of a provision of the Social Security Act itself, a matter that was beyond the competence of the Secretary to decide. Accord, *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 641 n.8 (1975); *Schweiker* v. *Wilson*, 450 U.S. 221, 227-228 (1981). This case, by contrast, involves questions arising *under* the Act: whether BCBR surgery is a covered medical procedure and whether the Secretary was required by the doctrine of offensive nonmutual collateral estoppel to award respondents benefits. The first determination is expressly committed by statute to the Secretary (42 U.S.C. 1395ff(a)), and the role collateral estoppel should play in making that determination is a procedural question that likewise is for the Secretary to resolve in the first instance (42 U.S.C. 405(a) and 1395ff(a)). Gov't Br. 48-49. As even the dissenting Justices in *Salfi* recognized, where an individual is "claiming that the Social Security Act *itself* provides him certain rights," he "'*must* exhaust administrative remedies, and the District Court is limited to *review* of the Secretary's de-

cision, in the manner prescribed by § 405(g)." 422 U.S. at 790 (emphasis in original). A court therefore cannot deem the Secretary to have dispensed with the complete exhaustion that is required by her own regulations where the issues in dispute are within her competence to decide.[10]

Moreover, here, unlike in *Salfi* and *Diaz*, there has been no particularized stipulation or agreement by the Secretary that the very applications filed by the individual claimants before the court will be denied or that the Secretary and respondents agree on the proper resolution of all issues of fact and statutory interpretation relating to those applications. Gov't Br. 42. Respondents therefore are reduced to relying on the October 1980

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[10] Because the Secretary now has promulgated regulations that establish a procedure for dispensing with administrative review beyond the reconsideration stage where only the constitutionality of a statutory provision remains in issue (see Gov't Br. 39-41), a court could not now find a waiver of exhaustion by the Secretary even in the circumstances presented in *Salfi* and *Diaz* if the claimant had not availed himself of those procedures.

Respondents suggest (Resp. Br. 14 n.12) that this Court in *Diaz* "implicitly" rejected the position that the Secretary's regulations must control. This suggestion is without merit. It would be startling indeed if the Secretary could not establish procedures for deciding when she will make such a waiver, and nothing in the opinion or background of *Diaz* suggests that she may not. The Secretary informed the Court in *Diaz* that regulations governing claims involving only constitutional issues were being considered in September 1975 (Gov't Supp. Br. 5 n.2 (No. 73-1046, 1975 Term)), but the Secretary did not suggest that those regulations would control in *Diaz* itself if they subsequently were promulgated. In their Supplemental Reply Brief in *Diaz*, the appellees noted (at 4 & n.1) that the Secretary was considering promulgation of the regulations and did not challenge his authority to do so. The appellees simply argued that the Secretary already had committed himself to "finality" in the case of appellee Espinosa's claim by his stipulations in district court, and the Court disposed of the exhaustion question in *Diaz* on that narrow ground. 426 U.S. at 76-77 & n.11. Accordingly, although the Secretary's special expediting regulations were promulgated in November 1975, before *Diaz* was reargued or decided, the Court had no occasion to consider their validity.

HCFA ruling, not the circumstances of their own individual claims, in support of their contention that the Secretary has "waived" exhaustion here. But to excuse exhaustion of administrative remedies on individual claims on the basis of the Secretary's issuance of a ruling of *general applicability* would tear the limited waiver rationale of *Salfi* and *Diaz* from its roots and transform it into a potentially limitless doctrine under which a court may excuse compliance with the statutorily mandated exhaustion requirement in whole categories of cases based on its belief that the Secretary has taken a "final position" on a particular issue and would be unlikely to change her view on that issue in the course of further review of an individual claim for benefits. Indeed, respondents and amici candidly acknowledge that that is precisely their goal in this litigation. See Resp. Br. 16; Am. Br. 31-35. See, *e.g.*, *Kuehner* v. *Schweiker*, 717 F.2d 813, 817-818 (3d Cir. 1983).[11] This result would radically restructure the Social Security claims adjudication process, for "there is no decision of this Court that has interpreted the Secretary's announcement of her interpretation of a Social Security statute as a waiver of the exhaustion requirement." *Heckler* v. *Lopez*, No. A-145 (Sept. 9, 1983), slip op. 8 (Rehnquist, Circuit Justice). There are, in addition, at least five major flaws in this submission:

First, the Secretary in 1980 explicitly *rejected* a proposal that the special procedure for expediting judicial review of constitutional questions be expanded to include claims in which the validity of a regulation is challenged, concluding that exhaustion in such cases "serves a clearly useful purpose, since it avoids time-consuming and often expensive judicial intervention in cases where the agency has authority to address the claimant's complaint." 45 Fed. Reg. 52079 (1980). A finding that the Secretary

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[11] Moreover, the logic of their position would appear to apply irrespective of the manner by which the Secretary expressed her allegedly "final position"—whether in a brief filed in another case, an interpretative ruling, a press release, or congressional testimony.

has waived exhaustion would fly in the face of this determination.

Second, for a court to dispense with exhaustion on the basis of a ruling or statement that it believes represents the Secretary's "final position" on a particular issue would be contrary to this Court's holding in *Salfi* that whether exhaustion would be futile and should be excused is for the Secretary, not the courts, to determine. Indeed, in *Salfi* itself, the challenged statutory provision perforce constituted the Secretary's "final position" on whether benefits could be paid, but the Court did not excuse exhaustion on that broad basis.

Third, respondents disregard the text and purposes of 42 U.S.C. 1395ff(b) and 42 U.S.C. (Supp. V) 405(g). Those sections do not authorize judicial review of the Secretary's "final position" on legal issues or of the "polic[ies] or practice[s] of the Secretary" as such (Am. Br. 31). They authorize judicial review only of the Secretary's "final decision" regarding "the rights of any individual applying for a payment" (42 U.S.C. 405(b)). A court may review the Secretary's legal positions and practices only as an incident to its consideration of the Secretary's final denial of a specific claim for benefits.

Fourth, the policies supporting the statutory requirement that the claimant exhaust his administrative remedies and obtain a single "final decision" disposing of *all* issues bearing on the claim for benefits before seeking judicial review clearly are not rendered inapplicable merely because the Secretary has promulgated a regulation or taken a position on *one* of those issues. As in every adjudication, it remains necessary for the Secretary to apply all relevant law and policy of general applicability to the circumstances of the particular case and to render a final administrative judgment on the claim. Even where it might appear that a regulation would absolutely bar the payment of benefits, exhaustion ensures that the ALJ and Appeals Council will have an opportunity to determine that the regulation actually applies

to the particular claim. In this very case, for example, the ALJ determined that the regulation respondents challenge did *not* apply to their claims. Exhaustion also enables the ALJ and Appeals Council to determine whether the claim should be allowed on other grounds or is invalid for other reasons, and to resolve any factual or legal issues unrelated to the challenged regulation or policy that may be lurking in the case. *Salfi*, 422 U.S. at 762; *Eldridge*, 424 U.S. at 331-332. In this way, exhaustion may obviate the need for judicial review altogether or at least narrow the issues to be presented, and also may provide the court with a complete record and the benefit of the ALJ's and Appeals Council's reasoning so that any issues remaining in dispute are brought more sharply into focus. See *Heckler* v. *Lopez*, slip op. 9 (Rehnquist, Circuit Justice); *Smith* v. *Schweiker*, 709 F.2d 777, 780-781 (2d Cir. 1983).

Fifth, the interlocutory and piecemeal judicial review respondents and amici advocate would substantially disrupt the administrative process and impose a significant additional burden on the courts. For example, if the claimant abandoned the administrative process when he sought interlocutory judicial review, would his right of administrative review be reinstated despite his procedural default if the court subsequently dismissed the suit for failure to exhaust? And if the claimant requested an ALJ hearing *in addition* to seeking immediate judicial review, as respondents did here, should the ALJ or Appeals Council stay further action pending completion of judicial proceedings? To do so would stand the exhaustion doctrine on its head, and the result would be to delay administrative proceedings and perhaps *postpone* the payment of benefits to a person who would have been found by the ALJ or Appeals Council to be entitled to receive them. See, *e.g.*, *Heckler* v. *Lopez*, slip op. 9 (Rehnquist, Circuit Justice); *Smith* v. *Schweiker*, 709 F.2d at 778, 780-781. Yet if the ALJ and Appeals Council do not stay their hands, the result would be duplicative proceedings and a waste of judicial and administrative re-

sources. Moreover, no matter what the agency does administratively, there would be extensive and wasteful litigation in court on the threshold questions of exhaustion and jurisdiction. And even if the claimant prevailed on interlocutory judicial review of a particular issue involved in his claim, a second round of judicial proceedings might well be required if the Secretary subsequently denied the claim on other grounds. All of these difficulties would be avoided if the courts and claimants simply adhered to the straightforward and entirely reasonable statutory exhaustion requirement.[12]

5. Respondents plainly err in contending (Resp. Br. 17) that the decision in *Mathews* v. *Eldridge*, permitting immediate judicial review of what the Court termed a "collateral" issue without requiring full exhaustion of administrative remedies, supports a finding that the district court had jurisdiction in this case. See Gov't Br. 46-48. In *Eldridge*, the Court relied on three factors: (1) the constitutional question at issue was "entirely collateral to [the] substantive claim of entitlement" (424 U.S. at 330); (2) the very nature of the asserted constitutional right to a *pre*deprivation hearing was such that full relief could not be obtained at a *post*deprivation

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[12] The potential difficulties are illustrated by the extreme to which the Third Circuit carried respondents' theory in *Kuehner* v. *Schweiker*, *supra*. There the court held that the allegations in the complaint, filed on behalf of a class of thousands of beneficiaries who had not exhausted their administrative remedies, that the Secretary in fact had adopted "fixed policies" on a number of issues must be assumed to be true for purposes of a motion to dismiss under Fed. R. Civ. P. 12(b)(1) and that the plaintiffs were entitled to an opportunity to prove those allegations. 717 F.2d at 815, 818. We submit, however, that rather than conducting a trial on whether the Secretary actually has expressed a "final" view on an issue and disrupting the administrative review of thousands of claims in the process, the court should simply have awaited the Secretary's "final decision" on an individual benefit claim, which would express her final position, as applied to that claim, on any "issue" that ultimately played a part in her decision. The Solicitor General has determined that a petition for a writ of certiorari will be filed in *Kuehner*.

hearing (*id.* at 330-331); and (3) denying the substantive claim for other reasons or awarding retroactive benefits under other provisions would not answer the asserted right (*id.* at 331-332). This case is completely different. Respondents' challenge to the HCFA rulings barring payment for BCBR and their assertion that payment must be allowed under the doctrine of collateral estoppel are integral elements of their claim of entitlement to benefits; they are not even remotely "collateral" issues. Furthermore, these issues can be fully reviewed in the ordinary course of further administrative and judicial review and can be sufficiently remedied or answered by an award of benefits on these or other grounds or a denial of benefits for independent reasons.

The inapplicability here of the narrow "collateral issue" exception recognized in *Eldridge* also is confirmed by the parallel the Court drew in that case between 42 U.S.C. 405(g) and 28 U.S.C. 1291, which likewise provides for review only of "final decisions." See 424 U.S. at 331 n.11, citing *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). It is of course firmly established that 28 U.S.C. 1291 prohibits piecemeal review and ordinarily permits an appeal only from a final judgment disposing of all issues in the case. See, *e.g.*, *Cobbledick* v. *United States*, 309 U.S. 323, 328 (1940). However, this Court has recognized a narrow exception to the final judgment rule under 28 U.S.C. 1291 for "collateral orders." To qualify, such an order must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). The pretermination hearing issue involved in *Eldridge* satisfied these criteria,[13] but the issues respondents raise clearly do not. The Secretary did not "conclusively determine" the collateral estoppel question, because respondents were free to press

[13] Accord, *Califano* v. *Yamasaki*, 442 U.S. 682, 703 (1979); cf. *Heckler* v. *Day*, No. 82-1371 (argued Dec. 5, 1983).

that argument before the ALJ and Appeals Council (see Gov't Br. 49). And neither that issue nor respondents' attack on the Secretary's BCBR ruling is at all "separate from the merits of the action" or "effectively unreviewable" on judicial review of a "final judgment" by the Secretary.[14]

6. Finally, respondents contend (Resp. Br. 19-29) that even if the district court did not have jurisdiction under 42 U.S.C. 1395ff(b) and 42 U.S.C. (Supp. V) 405(g) because they failed to exhaust their administrative remedies, they nevertheless could obtain immediate judicial review under 28 U.S.C. (Supp. V) 1331 or 28 U.S.C. 1361 of what they label "procedural" issues involved in the Secretary's interlocutory decisions denying their claims. This contention, if accepted, would totally undermine the purposes Congress sought to accomplish by establishing the special statutory review procedure in 42 U.S.C. 1395ff and 405. Congress recognized as much in 1939, when it enacted 42 U.S.C. 405 and expressly precluded such circumvention.

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[14] Respondents argue (Resp. Br. 17) that exhaustion of administrative remedies should be excused because their "interest in prompt judicial review is predicated upon a vital interest in restoring their ability to function as viable human beings and often upon life or death concerns." This suggestion is simply wrong. The only respondents who could file an application for benefits and therefore raise the exhaustion issue are the three who already underwent the BCBR surgery. Thus, in this as in any other Medicare case, any time that elapses while the applications for reimbursement are reviewed administratively could not cause postponement of the medical services. Claimants of course do not receive benefits while their claims are being considered, but Congress clearly intended that consequence when it provided for the consideration of Medicare claims according to the then-existing procedures established under 42 U.S.C. 405(b) and (g) for Title II claims. See also 42 U.S.C. (Supp. V) 421(d) and 42 U.S.C. (Supp. V) 1383(c)(1) and (3). Just as a court of appeals cannot excuse compliance with the jurisdictional "final decision" requirement in 28 U.S.C. 1291 based on its own view of a party's interest in obtaining immediate review, a district court cannot on that basis excuse compliance with the "final decision" and corresponding exhaustion requirement in 42 U.S.C. 1395ff(b) and 42 U.S.C. (Supp. V) 405(g).

The second sentence of 42 U.S.C. 405(h) provides that no decision of the Secretary shall be subject to review by any "tribunal * * * except as herein provided"—*i.e.*, except pursuant to 42 U.S.C. 405(g)—and the legislative history shows that Congress meant exactly what it said. See page 7 and note 6, *supra*. This broad language clearly encompasses mandamus actions under 28 U.S.C. 1361 as well as suits under 28 U.S.C. (Supp. V) 1331.[15] In addition, the third sentence of Section 405(g) provides that "[n]o action" to recover on any claim under the Act shall be brought "under section 41 of Title 28" of the United States Code. See Gov't Br. 33 n.24. The Court held in *Salfi* that this sentence bars suits under 28 U.S.C. 1331, and respondents' efforts to avoid that holding (Resp. Br. 26-29), which amici do not join, have been fully answered in our opening brief (Gov't Br. 20-32). Moreover, contrary to respondents' contention (Resp. Br. 20-22), the third sentence of Section 405(h) also clearly precludes the exercise of mandamus jurisdiction.

As this Court observed in *Salfi*, "[a]t the time § 405(h) was enacted, and prior to the 1948 recodification of Title 28, § 41 contained all of that Title's grants of jurisdiction to United States district courts, save for special-purpose jurisdictional grants" (422 U.S. at 756

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[15] This conclusion is reinforced by the fact that the first and second sentences of Section 405(h) were explicitly patterned after the statutory provision in effect in 1939 that precluded all judicial review of veterans benefits determinations, which expressly barred review by mandamus (Act of Mar. 20, 1933, ch. 3, § 5, 48 Stat. 9; *Lynch* v. *United States*, 292 U.S. 571, 587 (1934)). See H.R. Doc. 110, 76th Cong., 1st Sess. 13 (1939); S. Doc. 10, at 13; *Social Security: Hearings Before the House Comm. on Ways and Means*, 76th Cong., 1st Sess. 2288 (1939); cf. S. Rep. 734, at 51. Like 42 U.S.C. 405(h), several of the versions of the veterans benefits preclusion in effect over the years have not specifically referred to mandamus (see *Johnson* v. *Robison*, 415 U.S. 361, 368-369 nn.9-10 (1974)), but Congress did not intend that the absence of such a reference would result in a less sweeping bar. See S. Rep. 2198, 76th Cong., 3d Sess. 11-12 (1940); 86 Cong. Rec. 13491 (1940).

n.3). In the 1948 recodification, these general grants of jurisdiction were carried forward en bloc in what is now Chapter 85 of Title 28, which, like its predecessor, is entitled: "District Courts; Jurisdiction." When Congress enacted the general grant of mandamus jurisdiction in 1962, it specified that the new mandamus provision would be included within "chapter 85 of title 28 of the United States Code" (Act of Oct. 5, 1962, Pub. L. No. 87-748, 76 Stat. 744). By this enactment, Congress deliberately placed 28 U.S.C. 1361 within the chapter that is the present-day codification of the prior Section 41 of Title 28, and therefore squarely within the "sweeping" preclusion of review in the third sentence of 42 U.S.C. 405(h). *Salfi*, 422 U.S. at 757.[16] This construction of the third sentence of Section 405(h) is fully consistent with the congressional purpose of channeling review of all procedural and substantive issues relating to a claim for benefits through the special statutory review procedure in 42 U.S.C. (Supp. V) 405(g) and ensuring that "the Board is protected against the possibility of reversals of its decisions in separate actions filed for th[is] purpose" (S. Doc. 10, at 39). There is no difference between mandamus and federal question jurisdiction insofar as accomplishment of that purpose is concerned.

Nor is there any justification for construing Section 405(h) in a manner contrary to its language and purpose because of a perceived need to preserve mandamus jurisdiction for issues that may arise in connection with a claim for benefits for which jurisdiction under 42 U.S.C. (Supp. V) 405(g) is unavailable. Congress obviously believed and intended that the self-contained scheme in 42 U.S.C. 405(g) would furnish a fully adequate means for obtaining judicial review, and this Court's re-

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[16] Indeed, in *Salfi* itself the district court's jurisdiction was invoked under 28 U.S.C. 1361 as well as 28 U.S.C. 1331 (J.A. 7 (No. 74-214, 1974 Term)), and yet the Court ordered dismissal of the complaint insofar as it concerned class members who failed to satisfy the jurisdictional requirements of 42 U.S.C. 405(g), on the ground that "[o]ther sources of jurisdiction [are] foreclosed by § 405(h)" (422 U.S. at 764).

peated experience with Section 405(g) in *Salfi* and its progeny has shown that Congress's expectation was well founded. Where Congress has not precluded judicial review of certain Social Security claims altogether (see *United States* v. *Erika, Inc., supra*), this Court has made clear that the statutory finality requirement in 42 U.S.C. (Supp. V) 405(g) will "be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered" (*Mathews* v. *Eldridge*, 424 U.S. at 331 n.11). For this reason, a construction of the second and third sentences of Section 405(h) that forecloses the exercise of mandamus jurisdiction also is supported by established principles that bar mandamus relief where there is another adequate remedy. See *United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U.S. 540, 543-544 (1937); Gov't Br. 35.[17]

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[17] Respondents' and amici's argument that mandamus jurisdiction is not barred by 42 U.S.C. 405(h) is insubstantial. It proceeds as follows (Resp. Br. 21-22; Am. Br. 43-46): (1) prior to the enactment of Section 405 in 1939, the district court for the District of Columbia could have exercised common law mandamus jurisdiction over the Board; (2) the enactment of Section 405(h) in 1939 did not prevent the exercise of common law mandamus because that section only bars the exercise of statutory jurisdiction; and (3) 28 U.S.C. 1361 simply authorizes all district courts to exercise the jurisdiction that the district court in the District of Columbia previously possessed (see *Stafford* v. *Briggs*, 444 U.S. 527, 534-535 (1980)), and therefore is likewise not within the reach of Section 405(h). The first of these premises may or may not be correct, but it is irrelevant because the second and third premises are seriously flawed.

The committee reports on the 1939 statute in which Section 405 was enacted in fact do express some uncertainty on the question of judicial review, noting that the then-present provisions of the Social Security Act "do not specify what remedy, if any, is open to a claimant in the event his claim to benefits is denied by the Board." S. Rep. 734, at 52; H.R. Rep. 728, at 43. The very purpose of the 1939 amendments, however, was to "specify" such a remedy in the statute itself and to preclude all others, including both the statutory jurisdictional bases encompassed by the third sentence of Section 405(h) and any other form of judicial review by

In any event, mandamus relief is clearly unavailable with respect to the only argument respondents seek to raise under 28 U.S.C. 1361 (see Resp. Br. 23-25): that the Secretary was required to award benefits to them because ALJs and the Appeals Council previously had awarded benefits to *other* claimants for BCBR surgery. That argument, which was frivolous to begin with, now is foreclosed by this Court's decision in *United States* v. *Mendoza*, No. 82-849 (Jan. 10, 1984), barring the use of nonmutual collateral estoppel against the government. But even if this argument had merit, there would be no reason, despite the constitutional label respondents attach to it, to excuse them from presenting the argument to the ALJ and Appeals Council. See Gov't Br. 49; see also *Heckler* v. *Lopez*, slip op. 8 (Rehnquist, Circuit Justice); slip op. 6 (Stevens, J., dissenting).

For the foregoing reasons and the additional reasons stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

FEBRUARY 1984

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any "tribunal," as provided in the second sentence. The latter preclusion necessarily applied to common law mandamus. See page 17, *supra*. Moreover, an action under the newly enacted 42 U.S.C. 405(g) was required to be brought in the judicial district where the claimant resided and thus could not be brought in the District of Columbia unless the claimant resided there. It would have been inconsistent with this statutory scheme that dispersed Social Security cases throughout the country to permit a claimant to obtain judicial review of a decision of the Board (or certain issues relating to such a decision) under common law mandamus jurisdiction in the District of Columbia. And in any event, as explained in the text, Congress enacted the general grant of mandamus jurisdiction in 1962 in a manner that clearly brought it within the sweep of the third sentence of Section 405(h) as well.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 432-080 282

Office-Supreme Court, U.S.
FILED
OCT 20 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1772

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF
THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

FREEMAN H. RINGER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE OF THE ALLIANCE OF SOCIAL SECURITY DISABILITY RECIPIENTS AND THE GRAY PANTHERS IN SUPPORT OF RESPONDENTS' POSITION

Sally Hart Wilson
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No. 82-1772

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF
THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

FREEMAN H. RINGER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE

INTERESTS OF AMICI

Pursuant to Supreme Court Rule 36, counsel for the petitioner and the respondents have consented to the filing of their brief amici curiae. Their letters of consent have been filed with the Clerk of the Court.

The Alliance of Social Security

Disability Recipients is an organization founded to serve disability applicants and recipients. The Alliance was formed by disability recipients, their family members and concerned citizens in response to harsh, unfair and illegal denials and terminations of disabled Americans by the Social Security Administration (SSA) which is under the jurisdiction of the Secretary of the Department of Health and Human Services (HHS). At this time, the Alliance has approximately 3,000 members in eighteen states. The members of the Alliance are aware of the important role which the federal courts have played in curbing abuses in the Social Security and Supplemental Security Income (SSI) disability programs by reviewing the final decisions of the Secretary. They are particularly concerned that the federal courts' jurisdiction to review the Secretary's decisions under 42 U.S.C.

§405(g), as interpreted by this Court and the Circuit Courts of Appeals, be preserved and they do not believe that 42 U.S.C. §405(h) precludes mandamus jurisdiction.

The Gray Panthers is a national organization comprised of approximately 40,000 individuals who reside throughout the United States. "Dedicated to helping the Nation's elderly," Schweiker v. Gray Panthers, 453 U.S. 34,40 (1981), its members seek to reform and improve various laws and institutions which affect the lives of the nation's elderly, including the Social Security, Supplemental Security Income, and Medicare programs. They share the concerns of the Alliance of Social Security Disability Recipients that this Court preserve the jurisdictional bases available to individuals injured by actions of the Secretary of Health and Human Services in these three programs.

SUMMARY OF ARGUMENT

1. The Secretary raises many issues which are not properly before the Court and which amici suggest this Court should not address. These issues have not received the benefit of thorough development in the lower courts which should precede review by this Court.

2. Jurisdiction exists under 42 U.S.C. §405(g) to address the procedural challenges raised by the respondents. The respondents have properly filed a "claim" and further exhaustion of administrative remedies would be futile.

3. The Secretary suggests that only she is capable of determining when further exhaustion of administrative remedies would be futile. This approach disregards this Court's decisions in Mathews v. Eldridge, 424 U.S. 319 (1976), and Mathews v. Diaz, 426 U.S. 67 (1976), and should not be adopted by this Court.

4. While amici believe that this Court need not reach the issue of whether 42 U.S.C. §405(h) precludes mandamus jurisdiction, if the Court does reach the issue, amici argue that mandamus jurisdiction is available and not barred by §405(h).

I. The Secretary's brief raises issues which are not properly before the Court.

Amici are concerned by the breadth with which the Secretary has painted the issues before the Court in this case. For example, the Secretary raises arguments regarding the legal enforceability of the Secretary's voluntary decision to waive the "benefit" exception for rulemaking under the Administrative Procedure Act, 5 U.S.C. §553 (Pet.Br. p. 31) See, discussion infra at page 40, footnote 8. This issue has never been raised before in this litigation. Amici respectfully suggest that because this issue has not benefited from development in the lower courts and

and need not be reached in order for this Court to dispose of the appeal, this Court should not address the issue on this appeal.

Similarly, the Secretary discusses Medicare Part B as well as Part A claims as if both kinds of claims were before the Court in this case. Amici urge the Court to consider only the Part A jurisdictional issues. Part B claims procedures are very different from Part A, involving limited hearing rights before carrier-supplied decision-makers rather than administrative law judges (ALJs) and no further appeal or judicial review thereafter. The Ninth Circuit Court of Appeals did not consider or rule on Part B issues. The record is thus wholly inadequate for consideration of jurisdictional or substantive issues relating to Part B claims.

Finally, both the Secretary and the respondents have supplied this Court

with detailed information regarding the bilateral carotid body resection ("BCBR"). Amici are not medical experts and express no opinion regarding the value of this procedure. Further, they suggest that the ultimate decision on the merits of this procedure is irrelevant to the jurisdictional issues which are properly before this Court.[1/]

[1/] The procedural posture of this case raises some questions regarding whether review by this Court was improvidently granted. For example, the record in this case does not reflect that the district court ever granted the motion to file an amended complaint, despite the fact that the amended complaint appears to be the focus of the Ninth Circuit's decision. In their original complaint, filed on September 18, 1980, respondents challenged on procedural grounds a Health Care Financing Administration (HCFA) Manual provision that prohibited payment for BCBR but was not binding upon ALJs or the Appeals Council. After the case was filed, on October 28, 1980, the government issued a Ruling that also barred payment for BCBR but was binding upon ALJs and the Appeals Council. While the underlying substantive rule apparently remained the same, its procedural enact-

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ment and application were changed substantially by the new Ruling. Plaintiffs' challenge to the rule is largely procedural. Although plaintiffs attempted to file an amended complaint in the district court specifically attacking the new Ruling (J.A. 9-33), their motion to amend was never acted upon by the district court. While the named plaintiffs' claims will apparently be determined under the old Manual provision, all current and future claims will be determined under the new HCFA Ruling.

The issuance of the new Ruling raises mootness and standing issues in this case. In similar circumstances, this Court has held that the promulgation by the governmental defendant of a new regulation during the pendancy of litigation rendered the plaintiffs' original claims moot. Richardson v. Wright, 405 U.S. 208, 209 (1972). Further, because it does not appear that the Ringer plaintiff beneficiaries' claims will be determined pursuant to the new Ruling, it does not appear that they have suffered any actual or threatened harm as a result of issuance of the Ruling. For this reason, if their claims will not be affected by the Ruling, questions exist as to whether they lack standing to challenge the new Ruling.

II. Jurisdiction exists under 42 U.S.C. §405(g) to address the procedural challenges raised by the respondents.

A. Identification of the issues.

Amici are concerned that the Secretary has framed the jurisdictional issues here in the extreme. This case does not provide the wide range of issues suggested by the Secretary nor justify the extreme solutions which the Secretary proposes. In fact, amici suggest that, in order to dispose of this appeal, this Court needs only to address one or two of the procedural issues raised by the respondents.[2/]

Amici believe that this Court should address two of the issues raised in

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[2/] For purposes of the remainder of this brief, amici ignore their concerns noted in footnote 1, regarding the current posture of this litigation. For this purpose, they join the parties and the Ninth Circuit in relying upon the amended complaint despite the fact that the district court never acted upon the motion to file the amended complaint.

the respondents' complaint:

1. Respondents' challenge to the Secretary's failure to comply with the procedural requirements of the Administrative Procedure Act, 5 U.S.C. §553 et seq., when she issued her ruling regarding BCBR in the Federal Register on October 28, 1980. Respondents alleged that the Secretary failed to provide an opportunity for public notice and comment prior to the issuance of the final rule. [Amended Complaint, Count Ten, ¶s 63 and 66; Prayer for Relief ¶4—[3]]

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[3] Paragraph 63 provides:

"The coverage Issues Appendices to the 'Medicare Carriers Manual' the 'Medicare Intermediary Manual' and the HCFA BCBR Ruling which provide that BCBR surgery is never a reasonable and necessary treatment of obstructive pulmonary conditions were issued without valid, legal, or proper notice of proposed rulemaking." (emphasis added) [J.A. 21]

Paragraph 66:

"As a result of defendant's failure to issue the policy precluding Medicare

(continued on next page)

2. Respondents' challenge to the Secretary's policy of permitting different levels of review to operate under different adjudicative standards, resulting in denials of reimbursement at one level while at the next two levels, reimbursement would be granted, if the beneficiary endured and pursued an appeal to the next level, as violative of the Fifth Amendment. [Amended Complaint, Count Three, ¶s 37 and 39 and Prayer for

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coverage of BCBR pursuant to the rule-making procedures specified by the Administrative Procedure Act, the requirements of 5 U.S.C. §553(b), 5 U.S.C. §706(2)(D) and 42 U.S.C. §1395hh have been violated and the exclusion from coverage of BCBR surgery contained in the Appendices is accordingly null and void and of no effect." [J.A. 21-22]

Prayer for Relief, ¶4, requested the court to:

"Declare that the Appendices and Ruling described in paragraph 3 above were issued without public notice or public participation, in violation of 5 U.S.C. §553, 5 U.S.C. §706, and 42 U.S.C. §1395hh and are therefore null and void and of no effect;" [J.A. 26]

Relief, ¶9.[4/]

As amici will discuss infra, jurisdiction exists for both of these challenges pursuant to 42 U.S.C. §405(g).

[4/] Paragraph 37 provides:

"Further, defendant's policy precluding Medicare coverage of the costs of BCBR unless payment is ordered by the Appeals Council or by an administrative law judge applies two standards of eligibility for Medicare benefits, one for beneficiaries who seek a hearing before an administrative law judge and one for beneficiaries who do not or are unable to obtain a hearing before an administrative law judge." [J.A. 17]

Paragraph 39:

"Defendant's policy arbitrarily and illegally discriminates against Medicare beneficiaries such as plaintiffs claiming Part A or Part B benefits for BCBR or desiring to obtain such treatment, and denies plaintiffs and the members of the class they represent equal protection of the laws in violation of the Fifth Amendment to the Constitution of the United States." [J.A. 18]

Prayer for Relief, ¶9:

"Declare that defendant's actions described herein deprive plaintiffs of equal protection of the laws in violation of the due process clause of the Fifth Amendment and enjoin defendant, preliminarily and permanently, from future violations." [J.A. 26]

As a result, the Court need not reach the issue of whether 42 U.S.C. §405(h) precludes mandamus jurisdiction. In addition, due to the nature of these two procedural issues, being preliminary to a ruling on the substantive issues raised by the respondents, if the Court rules that jurisdiction exists for either of these claims, the Court need not address the jurisidictional issues raised by the remainder of the respondents' complaint. For example, if this Court finds that jurisdiction exists for the district court to review the respondents' challenge to the Secretary's failure to comply with the public notice and comment procedures of the Administrative Procedure Act, the district court would then be required to review the merits of respondents' claim. As the Secretary made no effort to comply with the APA and does not even suggest that she did, it is

likely that the district court will require the Secretary to fulfill her obligations pursuant to the APA. At that point, the substantive issue of the availability of reimbursement for BCBR treatment would be fully developed, providing the courts with a more complete record should the Secretary's determination be challenged at a later date. Similarly, if this Court finds jurisdiction over the respondents' Fifth Amendment challenge to the Secretary's practice of permitting different adjudicative standards to exist at successive levels of review, invalidation of the challenged scheme would require the Secretary to adopt, pursuant to the APA, uniform standards. Pursuant to the public notice and comment requirements of the APA, the administrative record would then be available for review if further challenges were to be filed.

B. The challenges which this Court should address are procedural.

The respondents challenged the Secretary's issuance of the 1980 "ruling" without providing the opportunity for public notice and comment prior to the issuance of the final rule. [Amended Complaint, ¶s 63,66; Prayer for Relief, ¶4, set forth at footnote 3, supra.] While the Ninth Circuit held that jurisdiction exists for the respondents' APA challenge under federal question and mandamus jurisdiction, amici believe that the Court need not reach these issues because §405(g) provides jurisdiction for this challenge, at least with regard to those respondents who sought reimbursement for the BCBR procedure.

The APA challenge is purely procedural. A ruling by a court that the Secretary must comply with the public notice and comment requirements in no way requires a decision on the merits of

the substantive issue involved. The challenge is thus "entirely collateral to [the] substantive claim of entitlement." Mathews v. Eldridge, 424 U.S. 319, 330 (1976).

Similarly, the respondents' constitutional challenge to the Secretary's practice of permitting different adjudicative standards to exist at different levels of review [Amended Complaint, ¶s 37, 39; Prayer for Relief, ¶9, set forth at footnote 4, supra] represents a procedural challenge. A decision by the district court that the Secretary's standards must be uniform at all levels of review would leave the Secretary free, subject to constitutional and statutory limitations, to determine what standard would be applied at all administrative levels of review.

Despite the procedural nature of these claims, the Secretary has argued

that the respondents' procedural challenges "were 'inextricably intertwined with [its] challenge of the validity of the determination denying them Medicare coverage.'" Ringer v. Schweiker, 697 F.2d 1291, 1294 (9th Cir. 1982) Before this Court, the Secretary argues that the procedural issues are so "intimately bound up" (Pet.Br. p. 47) that they become inseparable. This is an extremely advantageous position for the Secretary: if adopted by the Court virtually no procedural issue could be considered "collateral" to the claim for benefits, Mathews v. Eldridge, 424 U.S. 319,330 (1976).

However, courts have generally rejected this effort by the Secretary to blur the lines between different, quite separable issues. For example, in Adams v. Califano, 474 F.Supp. 974, 981 (D.Md. 1979), affd. sub nom. Adams v. Harris, 643 F.2d 995 (4th Cir. 1981), the court

stated:

> Obviously, any procedural matter can conceivably affect the outcome of the substantive claim, and the plaintiffs contend here that it has. But that does not mean the procedural question is "inextricably intertwined" with the substantive claim. A procedural matter is sufficiently collateral to the substantive claim of entitlement when it has nothing to do with the issues involved in the determination of disability. See Caswell v. Califano, 583 F.2d 9, 14 & n. 11 (1st Cir. 1979).

The Court should reject the Secretary's efforts to obfuscate the issues raised in this case.

C. Respondents meet the requirements of §405(g) to raise their procedural challenges.

In Mathews v. Eldridge, 424 U.S. 319, 328 (1976), this Court delineated the parameters of its decision in Weinberger v. Salfi, 422 U.S. 749 (1975), that "the requirement that there be a final decision by the Secretary was regarded as 'central to the requisite grant of subject-matter jurisdiction...'

422 U.S. at 764." Id. at 328:

> Implicit in Salfi, however, is the principle that this condition consists of two elements, only one of which is purely 'jurisdictional' in the sense that it cannot be 'waived' by the Secretary in a particular case. The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The non-waivable element is the requirement that a claim for benefits shall have been presented to the Secretary. Absent such a claim there can be no 'decision' of any type, and some decision by the Secretary is clearly required by the statute.

With regard to their procedural claims, the respondents have met both the waivable and non-waivable portions of the Salfi test.

(i) The respondents have filed "claims" with the Secretary.

Respondents Holmes, Webster-Zieber and Vescio each filed a claim for reimbursement with the fiscal intermediary (Amended Complaint, ¶5, J.A. 11), after having undergone BCBR. The claims of Holmes and Webster-Zieber had been denied

by the intermediary pursuant to the manual instructions before the filing of the amended complaint. Id. These requests for reimbursement fall squarely within the limitations established in Salfi. There, the unnamed class members had not satisfied the requirements of §405(g) because the complaint did not allege "that they even filed an application with the Secretary, much less that he has rendered any decision, final or otherwise, review of which is sought." 422 U.S. at 764. Here, the respondents not only filed claims but they also received decisons denying their claims. In Mathews v. Diaz, 426 U.S. 67, 76 (1976), this Court found that the "claims" requirement had been met when the plaintiff filed an application for benefits and the Secretary had stipulated that the application would be denied. Unlike in this case, the Diaz

plaintiff had not even obtained a formal decision of denial from the Secretary at any level of review. By affirmatively filing a request for reimbursement and obtaining a decision on the request, the respondents have met the "claim" requirement.

(ii) Further exhaustion of administrative remedies should be waived.

The very nature of these procedural issues renders full exhaustion of administrative remedies inappropriate and unnecessary.

In Salfi, this Court recognized that there are benefits to be derived from requiring exhaustion of administrative remedies. It is "generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit

of its experience and expertise, and to compile a record which is adequate for judicial review." 422 U.S. at 765. However, "[o]nce a benefit applicant has presented his or her claim at a sufficiently high level of review to satisfy the Secretary's administrative needs, further exhaustion would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by any administrative or judicial interest." Id. at 765-6.

With regard to the respondents' APA challenge, the Secretary's issuance of the Ruling without providing for the opportunity for public notice and comment represents the Secretary's considered opinion that she would not comply with the APA's requirements. It would be futile for the respondents to have pursued their claims further in an

effort to obtain compliance with the APA. Just as with the procedural challenge raised in Eldridge, "[i]t is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context." 424 U.S. at 330; see also Diaz, 426 U.S. at 76. It is equally unlikely that either an ALJ or the Appeals Council could or would seriously consider the statutory procedural challenge which the respondents raise.

An unfavorable decision for the Secretary by a court reviewing the APA challenge that the Secretary failed to provide public notice and comment will be far more detrimental to the agency if it is delayed for many months, or years than a decision shortly after the APA

violation occurred. The outcome could be not only the requirement that the Secretary properly seek public notice and comment but also the invalidation of her regulation back to the date of issuance. See, for example, Buschmann v. Schweiker, 676 F.2d 352, 357-8 (9th Cir. 1982) [invalidating an improperly issued HHS regulation in the Supplemental Security Income program for the period "from December 1974 until promulgation of the final rule on July 7, 1978."]

The respondents' constitutional challenge to the failure to provide uniform standards for adjudicating decisions raises similar issues. The Secretary is not required to consider the challenge in the administrative review process. Eldridge, 424 U.S. at 330. In addition, the failure to correct the constitutional flaw results in elderly and disabled individuals being forced

to be extremely persistent in order to assure that reimbursement is paid. If they do not appeal, possibly believing that a correct standard was applied, they will be saddled with a substantial medical bill.[5/] Even if they do appeal, they will have been forced to take part in an entire level of review which, by virtue of utilizing a more restrictive standard than the higher level of review, is essentially a sham. There is no justification for requiring the elderly and/or disabled Medicare beneficiary to exhaust all appeals in order to challenge the Secretary's failure to provide uniform standards at all levels of review. In Califano v. Yamasaki, 442 U.S. 682, 689 (1979), the plaintiffs had filed suit after the Secretary refused to halt recoupment of

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[5/] The record does not appear to reflect the cost of the BCBR procedure.

the alleged overpayment while their appeal proceeded. In that case, the Secretary "concede[d] that jurisdiction over the claims of the named plaintiffs was proper under §205(g)." 442 U.S. at 698. This case is no different: the procedural issues should be addressed separate from and prior to consideration of the substantive claims in order to assure that all substantive claims are properly and fairly adjudicated.

The cases challenging unreasonable delays in the Secretary's administrative appeals process present a similar situation. In those cases, the Secretary has argued unsuccessfully that the person must have had a hearing in order to satisfy the second requirement of §405(g). In Caswell v. Califano, 435 F.Supp. 127, 133 (D.Me. 1977), affd. 583 F.2d 9 (1st Cir. 1978), the court stated that it would be

> "ironic if the very delay now under attack which prevents the exhaustion of administrative remedies through no fault of the plaintiffs, constitutes a barrier to this Court's jurisdiction under §405(g)."

Similarly, here, it would be ironic if the plaintiffs had to endure the application of varying standards at each level of review in order to challenge the constitutionality of the process by which such inconsistent standards are permitted to exist.

D. It is appropriate for federal courts to determine that the Secretary has waived further exhaustion despite the Secretary's opposition to this finding.

Even if this court concludes that the Ninth Circuit erred in finding that further exhaustion was waived, amici urge this Court not to adopt the position advanced by the Secretary.

The Secretary asks this Court to substantially restrict its rulings in

Salfi, Eldridge, and Diaz. Put simply, the Secretary believes that only she is entitled to decide whether further exhaustion of administrative remedies would be futile. (Pet.Br. p. 38) Further, it is the Secretary's position that exhaustion would only be futile where an individual challenges the constitutionality of a statutory provision. See 20 C.F.R. §404.900(a)(6). The absurdity and harshness of this approach is reflected in numerous decisions of this Court and lower courts. There are many other circumstances where it would be completely futile to exhaust administrative remedies further and where to require such exhaustion would impose incredible hardships upon the claimants or beneficiaries involved. A few examples suggest how extreme the Secretary's position is:

1. There have been many cases where, despite the fact that the Secretary

claimed that there could be some benefit derived from further exhaustion, she also had filed a motion for summary judgment, representing to the court that "there is no genuine issue as to any material facts and...the moving party is entitled to a judgment as a matter of law." Fed. R.Civ.Proc. 56(c). In Mathews v. Diaz, 426 U.S. 67 (1976), the Secretary had filed a motion to dismiss, but "at the hearing on the motion he stipulated that no facts were in dispute, that the case was ripe for disposition by summary judgment, and that the only issue before the District Court was the constitutionality of the statute." Id. at 76. This Court held that, "For jurisdictional purposes, we treat the stipulation in the District Court as tantamount to a decision denying the application and as a waiver of the exhaustion requirements...We conclude, as we did in Salfi,

the the Secretary's submission of the question for decision on the merits by the District Court satisfied the statutory requirement of a hearing and final decision." Id. at 76-77. See also Wilson v. Edelman, 542 F.2d 1260, 1272-3 (7th Cir. 1976), noted in this Court's review, sub nom. Schweiker v. Wilson, 450 U.S. 221, 227-8 (1981) [This Court noted that the Seventh Circuit had "reversed the dismissal, holding that the Secretary had waived any requirement of exhaustion by her submission of the case to the District Court for summary disposition."]; Liberty Alliance of the Blind v. Califano, 568 F.2d 333, 346 (3d Cir. 1977) ["In concluding that the Secretary had waived the exhaustion requirement, the Court in Diaz reasoned that there were no facts in dispute, that the Secretary had filed a motion for summary judgment, and that the only issue was a constitutional one.

As in Diaz, the Secretary here filed a motion for summary judgment, thus suggesting that the case was appropriate for judicial resolution..."]

2. In recent years, there have been occasions in which the policy or practice of the Secretary which was being challenged has been all but etched in stone. Consistent with this Court's decision in Eldridge,[6/] in such cases the courts have felt comfortable in concluding that the Secretary's policy or practice was not likely to change or be seriously reviewed simply because one beneficiary raised the issue on appeal. For example, in Kuehner v. Schweiker, No. 82-1514 (3d Cir. September 19, 1983), the Third

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[6/] "It is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context. The Secretary would not be required even to consider such a challenge." Mathews v. Eldridge, 424 U.S. 319, 330 (1976).

Circuit Court of Appeals held that disabled OASDI and SSI beneficiaries who had received notices of termination and who had filed appeals could properly challenge the Secretary's failure to consider whether their conditions had medically improved under §405(g). The Secretary had previously issued "rulings of non-acquiescence," stating that she did not intend to follow two decisions of the Ninth Circuit Court of Appeals, Finnegan v. Mathews, 641 F.2d 1340 (9th Cir. 1981), and Patti v. Schweiker, 669 F.2d 582 (9th Cir. 1982). These two cases addressed the issues raised by the plaintiffs in Kuehner. The Social Security Administration (SSA) had also issued a memo to all SSA staff instructing them not to follow these decisions. (Slip. Op. p. 5).[7/] As a

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[7/] Amici note that the Secretary took this position despite her contrary representations to this Court in Califano v.
(continued on next page)

result, the Third Circuit concluded:

> Fairly read, the complaint alleges that the Social Security Administration's position on the challenged procedures is final. The government has filed no affidavit to the contrary. The nonacquiescence memorandum of February 23, 1982 referred to above suggests rather strongly that the plaintiffs will be able to prove the allegation. But in any event, for purposes of this Fed.R.Civ.P. 12(b)(1) ruling the allegation in the complaint controls and puts the case squarely within Liberty Alliance. (Slip. Op. p. 9)

Similarly, in Rivera v. Heckler, Civil No. 82-3331 (D.N.J. June 29, 1983), plaintiffs challenged the Secretary's failure to follow judicial precedent on

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Yamasaki, 442 U.S. 682, 699 (1979). Arguing that class certification was not permitted under §405(g), the Secretary told the Court that she would follow Circuit Court of Appeals decisions unless she appealed: "Restricted judicial review will not have a detrimental effect on the administration of the Social Security Act, the Secretary says, because he will appeal adverse decisions or abide [by] them within the jurisdiction of the courts rendering them."

two specific issues: (1) the Secretary refused to give substantial weight to the opinion of the claimant's treating physician, even when this opinion was uncontradicted by substantial evidence, in violation of Smith v. Schweiker, 671 F.2d 788, 792-93 (3d Cir. 1982), and Cotter v. Harris, 642 F.2d 700, 704 (3d Cir. 1981); and (2) the Secretary refused to give proper weight to the claimant's subjective complaints regarding pain in assessing the nature of the person's disabling condition, see Smith v. Califano, 637 F.2d 968, 972 (3d Cir. 1981). Citing Salfi, 422 U.S. at 765-66, the district court concluded that "exhaustion of administrative remedies here would serve no useful purpose." [Slip. op. page 6] Specifically:

> Adherence to a position of nonacquiescence to judicial precedent, even in the face of consistent reversal by ALJs, firmly evidences that the Secretary has taken a final

> position and is not willing to change. [citations omitted] When, as here, it is alleged that DDD [the state disability determination service regulated by the Secretary] is forcing claimants to pursue lengthy administrative appeals because the Secretary persists in promulgating standards for eligibility that are contrary to the law of the circuit, requiring exhaustion serves no useful function. (Slip. Op. page 7)

3. There have been other situations such as the one originally challenged in this case, where the Secretary permitted different standards of adjudication to exist at different levels of review. In these situations, the most restrictive interpretations have been utilized at the lowest levels of review. In Jones v. Califano, 576 F.2d 12 (2d Cir. 1978), plaintiffs challenged an HHS policy by which an SSI retroactive payment was to be reduced due to the receipt of Aid to Families with Dependent Children (AFDC). If a person appealed, the

administrative law judge would reverse the Secretary, but HHS would not change its policy. "By doing nothing the Secretary could effectively evade judicial review for many claimants who fail to contest [the formula used.]" 576 F.2d at 19.

These factual patterns suggest, as does her limited regulation, that the Secretary will never find waiver of administrative remedies to be appropriate unless the plaintiff seeks to challenge the constitutionality of a provision of the Social Security Act. As a matter of litigation strategy, she has opposed, and will continue to oppose, waiver regardless of the absurdity of that position. Her effort here to limit waivers to situations falling within her regulation simply emphasizes the need for a judicial role in assessing the appropriateness of waiver.

The Secretary's main justification

for arguing that this Court should restrict waiver of exhaustion to situations falling within her extremely limited regulation appears to be that this approach would eliminate uncertainty as to when waiver is available, "thereby making it unnecessary for the parties to engage in extensive litigation on this question in subsequent judicial proceedings and unnecessary for the court in those proceedings to infer from what otherwise might be ambigious circumstances whether the Secretary had actually concluded that further administrative proceedings are not required." (Pet. Br. p. 41) (emphasis added) There are at least three problems with this approach. First, as described supra, the situations evaluated by the courts have not been "ambiguous." The futility of further exhaustion has been readily apparent from the Secretary's actions. Second, the Secretary has apparently

concluded that judicial review of her decisions is not beneficial. As a result, she issued the unreasonably limited regulations for waiver which she now asks this Court to approve. Third, almost all of the "extensive litigation" on these jurisdictional issues has been precipitated by the Secretary's unwillingness to ever acknowledge to a court that she has made a final decision on a particular issue, regardless of how well documented her position is or the fact that she has already filed a motion for summary judgment in the action. As a result, the Secretary herself already controls the mechanisms for reducing the substantial litigation on these issues: she needs only to evaluate the challenges filed in light of a reasonable reading of this Court's decisions in Salfi, Eldridge, Diaz and Yamasaki.

20 C.F.R. §404.900(a)(6) should be viewed as one basis for waiving jurisdic-

tion. This Court's decisions in Salfi, Eldridge and Diaz represent a second, very necessary basis which should be preserved.

III. The exercise of mandamus jurisdiction approved by the Court of Appeals is not precluded by section 205(h) of the Social Security Act, 42 U.S.C. §405(h).

This Court must address the question whether the lower court's assumption of mandamus jurisdiction in this case was permissible only if the Court finds that jurisdiction for the respondents' claims is not available pursuant to the jurisdictional provision of the Social Security Act, 42 U.S.C. §405(g). However, if this Court does reach the issue of mandamus jurisdiction, amici submit that this issue was properly resolved by the Court of Appeals.

In urging reversal of the Court of Appeals' approval of the exercise of mandamus jurisdiction, the Secretary argues that she does not have a "clear

duty" to the respondents, characterizing the alleged duty to be the "determination whether BCBR is a reasonable and necessary medical service." [Pet. Br. pp. 35-36] Amici believe the duties here are very different from, and much clearer than, that described by the Secretary. First, it is the Secretary's constitutional duty to assure that all levels of the administrative review process adhere to the same standards in adjudicating cases. Second, it is the Secretary's statutory duty to assure that she complies with the public notice and comment requirements of the Administrative Procedure Act when she issues standards to be utilized at all levels of the administrative decision and review process.[8/]

[8/] As the Secretary notes, HHS (then HEW) waived the "benefit" exemption in the APA in 1970. See 36 Fed. Reg. 2532 (February 5, 1971). The Secretary argues that this

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memorandum was just a "statement of internal policy" and did not create any legally enforceable rights. (Pet.Br. p. 31) Amici do not believe that this issue is before the Court, see discussion at page 5, supra, and urge the Court not to address the issue in the context of this appeal. Amici also disagree with the Secretary's position. Once the Secretary has waived the benefits exemption, she is "fully bound to comply thereafter with the procedural demands of the APA." Rodway v. U.S. Department of Agriculture, 514 F.2d 809, 814 (D.C.Cir. 1975). See also Humana of South Carolina v. Califano, 590 F.2d 1070, 1084 (D.C.Cir. 1978); National Welfare Rights Organization v. Mathews, 533 F.2d 637, 646 (D.C.Cir. 1976); Kollett v. Harris, 619 F.2d 134, 143-144 (1st Cir. 1980); Tyson v. Maher 523 F.2d 972, 976 (2nd Cir. 1975); Arlington Oil Mills Inc. v. Knebel, 543 F.2d 1092, 1095 (5th Cir. 1976); Buschman v. Schweiker, 676 F.2d 352, 355 (9th Cir. 1982). These cases are consistent with decisions of this Court holding that once an agency voluntarily agrees to follow certain standards, it is obligated to comply with the standards. See Accardi v. Shaughnessy, 347 U.S. 260, 266 (1954); Service v. Dulles, 354 U.S. 363, 388 (1959); Vitarelli v. Seaton, 359 U.S. 535, 539 (1959); Morton v. Ruiz, 415 U.S. 199, 232 (1974). Further, it is only recently that the Secretary has adopted this position. Compare Buschman v. Schweiker, 676 F.2d 352, 356 n. 4 (9th Cir. 1982) ["Although 5 U.S.C. §553(a)(2) would have exempted the rulemaking procedure now in dispute, the then-Secretary of Health, Education and Welfare, in a policy statement dated

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If this Court rules that the Secretary has no duty in this particular circumstance, it need not reach the issue of whether mandamus jurisdiction is available, in light of §405(h). As discussed infra, amici believe that the history of the federal courts' mandamus jurisdiction, especially as that history relates to the enactment of §205(h), 42 U.S.C. §405(h), requires a conclusion §405(h) does not preclude mandamus jurisdiction.

42 U.S.C. §405(h) provides, in relevant part, that:

> "No findings of fact or decision of the Secretary shall be reviewed

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January 28, 1971, (36 F.R. 2532), required all agencies and offices in his department to utilize the public participation procedures of §553. The Secretary does not contest his legal obligation to comply with §553 procedures." (emphasis added)] with HHS' proposed rules stating that "voluntary use of the notice and comment procedures is meant as a guideline rather than as a right enforceable at law," 47 Fed. Reg. 26860 (June 22, 1982).

> by any person, tribunal, or government agency except as herein provided. No action against the United States, the Secretary, or any officer, or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this sub-chapter." 9/

At the time the foregoing language was enacted in 1935, 49 Stat. 624, section 41 of Title 28 of the United States Code comprised most grants of subject matter jurisdiction to the federal courts. It did not, however, include mandamus jurisdiction which at that time was grounded entirely in the common law of the District of Columbia. Mandamus had been

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9/ The codifiers have substituted "under sections 1331 or 1346 of title 28" for "under section 41 of Title 28" in 42 U.S.C. §405(h). This change was made without any change by the Congress of the statutory language. See "codification" note, following 42 U.S.C. §405, Cumulative Pocket Part, United States Code Annotated (1983).

available in the courts of the District of Columbia as a non-statutory remedy to compel performance of duties owed by federal officials since the establishment of the District as the nation's capitol. See McIntyre v. Wood, 11 U.S. (7 Cranch) 504 (1813); Kendall v. United States, ex. rel. Stokes, 37 U.S. (12 Pet.) 524 (1838). Since the prohibitions in §405(h) contained, at the time they were enacted, absolutely no reference to common law mandamus jurisdiction, there is no basis for the Secretary's inference that §405(h) was intended to restrict the ability of persons owed duties by federal officials to enforce them in the courts of the District of Columbia.

In 1948, section 41 of Title 28 was recodified, and its jurisdictional grants restated. Mandamus jurisdiction, however, continued to be grounded exclusively in

the common law and to be available only in the United States District Court for the District of Columbia.

In 1962, Congress acted to end the historical anomaly which required any person, no matter where he lived, to bring a claim in the nature of mandamus in the District of Columbia. The Mandamus and Venue Act of 1962, Pub.L. No. 87-748 (October 5, 1962), was enacted to provide "a remedy by which ... jurisdiction [over federal officers and employees formerly exercised in the District of Columbia courts] could be exercised throughout the country." Smith v. United States, 330 F.2d 70, 72 (10th Cir. 1964). This expansion of the venue for proceedings in the nature of mandamus was in no way designed either to expand or constrict the substantive breadth of the jurisdictional grant. The accompanying codification of common law mandamus juris-

diction at its present location, 28 U.S.C. §1361, in no way changed the relationship of the mandamus power to other grants of subject matter jurisdiction in existence at the time of such codification.

The foregoing history provides no support for the Secretary's contention that the current appearance of the federal courts' mandamus power in the portion of the United States Code that succeeds section 41 of Title 28 means that the mandamus power was abrogated by the enactment of section 405(h). If section 405(h) did not affect common law mandamus jurisdiction at the time it was enacted, which it plainly did not, it cannot be said to undermine an identical substantive grant of jurisdiction merely because the expansion of the venue within which that grant could be exercised required that it be codified within Title 28.

The Secretary admits that the mandamus

provision was not included in "Section 41 of Title 28" (Pet.Br. p. 33), but argues nevertheless that the "'sweeping' language of the third sentence of section 405(h)" should be interpreted as "barring jurisdiction under the mandamus statute whenever jurisdiction over the particular suit under 28 U.S.C. §1331 also would be barred." (Pet.Br. p. 34) First, if the Congress intended "to channel all judicial review through 42 U.S.C. §405(g)" (Pet.Br. p. 34), it could have specifically precluded all other forms of review. Compare 38 U.S.C. §211(a), discussed in Salfi, 422 U.S. at 761. Second, the Secretary here frames the limitation upon mandamus jurisdiction as being coextensive with the bar upon §1331 jurisdiction. (Pet.Br. p. 34) Amici believe that the Secretary is offering a new interpretation which implies that, to the extent that §1331 jurisdiction and mandamus jurisdiction are not co-extensive, mandamus jurisdic-

tion is available, regardless of §405(h). This new approach completely undermines the Secretary's broader position that the language of 405(h) is so sweeping that it must necessarily be read to preclude all jurisdictional bases. Prior to 1976, §1331 jurisdiction was not available where the amount in controversy did not exceed $10,000. P.L. 94-574, 90 Stat. 2721 (1976). See discussion in Califano v. Sanders, 430 U.S. 99 (1977). As a result, it logically follows from the Secretary's argument that, prior to 1976, a beneficiary was entitled to seek mandamus jurisdiction where the amount in controversy was $10,000 or less. This would mean that §405(h) does not provide the complete bar to jurisdiction which the Secretary contends and undermines her argument that the Congress ever intended to preclude mandamus jurisdiction.

In sum, if, as the Court of Appeals

found, the district courts' jurisdiction over respondents' claims was properly founded on 28 U.S.C. §1361, that jurisdiction was not precluded by section 405(h). Should this court find it necessary to review the decision of the Court of Appeals upholding the exercise of mandamus jurisdiction, amici respectfully urge that that decision be affirmed.

CONCLUSION

Should the Court determine that this appeal is properly before it, amici urge the Court to limit its decision to the issue of jurisdiction over the procedural challenges required to dispose of the appeal. Further, they urge this Court to find that 42 U.S.C. §405(g) provides jurisdiction for these challenges. If, however, the Court concludes that §405(g) jurisdiction is not available, amici urge that the Court find that §405(h) does not preclude mandamus jurisdiction for these challenges and that mandamus

jurisdiction was appropriate in this case.

END OF DOCKET

No. 82-1772-CFX
Status: GRANTED

Title: Margaret M. Heckler, Secretary of Health and Human Services, Petitioner
v.
Freeman H. Ringer, et al.

Docketed:
April 29, 1983

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Harkins III, Malcolm J.

Entry	Date	Note	Proceedings and Orders
1	Mar 18 1983		Application for extension of time to file petition and order granting same until April 29, 1983 (Rehnquist, March 22, 1983).
2	Apr 20 1983		Application for further extension of time to file petition denied (Rehnquist, April 21, 1983).
3	Apr 29 1983	G	Petition for writ of certiorari filed.
4	May 27 1983		Brief of respondents Freeman H. Ringer, et al. in opposition filed.
5	Jun 1 1983		DISTRIBUTED. June 16, 1983
6	Jun 15 1983	X	Reply brief of petitioner filed.
8	Jun 20 1983		REDISTRIBUTED. June 23, 1983
9	Jun 27 1983		Petition GRANTED.
			**********
11	Aug 11 1983		Order extending time to file brief of petitioner on the merits until September 10, 1983.
12	Sep 10 1983		Order further extending time to file brief of petitioner on the merits until September 16, 1983.
13	Sep 16 1983		Brief of petitioner Margaret M. Heckler, etc. filed.
14	Sep 16 1983		Joint appendix filed.
15	Oct 1 1983		Record filed.
16	Oct 1 1983		Certified original record & C.A. proceedings, 5 volumes received.
17	Oct 20 1983		Brief of respondents Freeman H. Ringer, et al. filed.
18	Oct 20 1983		Brief amicus curiae of Alliance of Soc. Security Disability Recipients, et al. filed.
19	Jan 9 1984		SET FOR ARGUMENT. Monday, February 27, 1984. (2nd case)
20	Jan 11 1984		CIRCULATED.
21	Feb 16 1984	X	Reply brief of petitioner Margaret M. Heckler, etc. filed.
22	Feb 27 1984		ARGUED.